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Supreme Court, U.S.
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No. _____

THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DON N. WEST,

Petitioner,

vs.

BUFFALO CENTER-RAKE SCHOOL DISTRICT, BY ITS BOARD OF DIRECTORS,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS OF IOWA

PETITION FOR WRIT OF CERTIORARI
(Volume II)

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DON WEST,

Defendant.

Hearing was held in the above-captioned matter pursuant to the provisions of Iowa Code Section 279.24 on whether or not Don West should be dismissed as the Superintendent of the Buffalo Center-Rake Community School District. The hearing consisted of six days of testimony held between the dates of March 14, and March 30, 1990, at three different locations. These proceedings were initiated on January 10, 1990, when the Buffalo Center-Rake Community School District voted to consider termination of the employment contract of Don West. Notice of Consideration of Termination was then served upon Superintendent West on January 30, 1990, and Superintendent

West promptly sought hearing before an Administrative Law Judge. Pursuant thereto, evidentiary hearings were held on March 14, and March 15 at the Winnebago County Courthouse in Forest City, Iowa, on March 22 and March 23 at the Kossuth County Courthouse in Algona, Iowa, and on March 29 and March 30 at the Hancock County Courthouse in Garner, Iowa. The proceedings were held before the undersigned Administrative Law Judge who, at the conclusion of the evidentiary hearing, requested that the parties submit Briefs and Arguments and any Proposed Decisions by Wednesday, April 4, 1990. The undersigned, having heard the evidence, and having reviewed the parties Briefs, Arguments and Proposed Decisions hereby enters the following Findings of Fact and Proposed Decision.

FINDINGS OF FACT

Don West is the Superintendent of the Buffalo Center-Rake Community School District and has been since 1981. Prior to serving as Superintendent at Buffalo Center-Rake, he was the Principal at the school for approximately 12 years. In addition to his present Superintendency duties at Buffalo Center-Rake, he also serves as Superintendent of the Titonka School District. Buffalo Center-Rake Community School is presently involved in a whole grade sharing program with three other school districts, namely Lakota, Titonka and Thompson. The shared high school program is known as North Iowa High School. Buffalo Center-Rake Community School District has approximately 400 students.

On January 10, 1990, near the end of the meeting of the Buffalo Center-Rake Community School Board, the School Board

voted five to one, with one abstention, to consider termination of Superintendent West's contract as Superintendent of the Buffalo Center-Rake Community School District. On January 30, 1990, Superintendent West was served with Notice of Consideration of Termination and pursuant to Iowa Code Section 279.24, Superintendent West requested a hearing before an Administrative Law Judge. The undersigned Administrative Law Judge was selected and extensive discovery was conducted by each party as is shown by the file herein. Depositions were taken, Interrogatories were served and answered and documents were produced in response to Request for Production of Documents. In light of the extensive discovery and to allow time in which to complete the discovery, each party agreed orally and in writing to an extension of the 30 day

time period in which a hearing is to be held as provided for in Iowa Code Section 279.24.

The Board's Notice of Consideration of Termination of Administrator's Contract details 10 reasons why the board voted to consider termination of Superintendent West's contract. Discovery has elicited 38 specific incidents that comprise the 10 reasons alleged.

Many if not most of the points of dissatisfaction over Superintendent West have to do with what can best be characterized as his "management style" which is firm and involved in that he exercises a high degree of control over virtually all aspects of the school operation. Such a style of management or administration was typical in years gone by and remains typical in some small

school systems. As school organizations have become more sophisticated, however, and as school boards have become more involved, a natural tension develops within the school itself over jurisdiction and areas of responsibility and between administration and school board over knowledge and accountability. The dispute at Buffalo Center-Rake seems to epitomize, to a significant extent, the problems that can arise from such developments.

An illustration of the Superintendent's administrative style is his desire to limit staff and administrative contact with the School Board. Accordingly, Superintendent West has, over a period of years, directed the School Board Secretary not to attend Board meetings or take Board minutes, instructed Principal Fahlk and Principal

Monaghan not to attend Board meetings or to have any contact with the School Board, and discouraged staff members from attending Board meetings. Another illustration of the Superintendent's firm control and firm management style is the matter of evaluations of teachers and Superintendent West's control over Principal Monaghan's evaluation of those teachers. I do not find that Superintendent West ever told Principal Monaghan to falsify or fabricate an evaluation on any teacher. It may be that he said to give them bad evaluations but it's clear that he also told Monaghan the evaluation should stand up in court which means, in other words, that they be truthful and provable. This further illustrates, however, the management and leadership style of Superintendent West of running the entire school system.

Rather than allowing his Principal to conduct an independent evaluation, Superintendent West felt it was appropriate and necessary for him to get directly involved in matters that should have been delegated to and dealt with by others.

The NCA report was favorable in many respect toward the school yet concerns were expressed in the areas of administration, communication, management style and staff morale. Mr. Mullenberg, the chairman of the evaluation committee, characterized Superintendent West's management style as a "firm hand" style and the report indicated that it was unrealistic to continue that style. The report further indicated that Superintendent West needed to delegate more responsibility and that the High School Principal should have more input

in many areas including staff selection. The report also indicated that staff members were confused as to where budgeting requests were to be directed and as a consequence, many instructors would bypass the Principal and go directly to the Superintendent. The report further noted that staff members felt a lack of input and lack of communication with the administration and that the consequence of that would be staff morale problems.

There has been a significant breakdown in the communication and trust between Superintendent West and the Buffalo Center-Rake Community School Board. Each School Board member who testified at the hearing attested to such a breakdown or lack of trust between the Board and the Superintendent. This has occurred gradually over the last two

years approximately and has culminated in the present proceedings. Some of these problems can be attributed as much to the School Board as it can to Superintendent West. For example, the School Board complains in these proceedings about the declining financial condition of the School District. There is a declining financial condition within the School District which has been caused by a recent history of deficit spending. The School Board must share a portion of the blame for this deficit spending inasmuch as they retain the ultimate control over the school budget with certain limitations. Many of the expenditures incurred by the School District over the past few years have come as a result of direct Board action. The Board complains, however, that Superintendent West recommended many of those

expenditures, which is true. However, despite the Superintendent's recommendation, the Board always retains the right to reject such recommendations. Despite the School Board's right to reject certain proposed expenditures, it is not unreasonable for a School Board to look to and expect the Superintendent to be cautious in recommending new spending proposals to the School Board. Furthermore, it is not unreasonable for the School Board to expect the Superintendent to make specific recommendations to the School Board in reversing the deficit spending. School Board members are frequently not as knowledgeable about potential school income resources and potential school economies as would be a professional administrator such as Superintendent West. Many Superintendents will

affirmatively make specific proposals and recommendations to the School Board about income and/or expenses without waiting for the School Board to give directives to the Superintendent for such recommendations. In the instant case, Superintendent West had made the School Board aware of the declining financial condition and it is clear that the School Board knew or should have known of the declining financial condition. There is nothing in the record to indicate that the School Board specifically directed Superintendent West to make specific recommendations and proposals to the Board on how to deal with the declining financial situation. On the other hand, however, there is nothing in the record to indicate that Superintendent West ever took the initiative to undertake specific studies or to make any specific proposals

and recommendations to the Board as to how to deal with the financial situation.

The whole grade sharing arrangement that Buffalo Center is a member of has also been a source of miscommunication and misunderstanding between the Board and the Superintendent. This four way whole grade sharing arrangement may be the only such arrangement in Iowa. The record is clear that Superintendent West has been very instrumental in implementing this arrangement and has spent a significant amount of time not only negotiating this agreement but also in implementing same. The time spent in such an arrangement as well as the time that Superintendent West has spent in serving as Superintendent of Titonka has reduced the time that he traditionally would have spent at Buffalo Center and has interfered with his ability to

function efficiently and effectively as Superintendent at Buffalo Center-Rake. These new time constraints have pressured Superintendent West to make a change in how he functions as an administrator which apparently has been hard to do. For example, Superintendent West has found it difficult if not impossible to delegate certain menial tasks such as collecting and sorting mail. Delegation should also be of administrative responsibilities to his High School Principal, Allyn Monaghan, which is another source of considerable tension within the School District. The changing times, including a more complex set of rules for operating school systems, demand that Superintendent West change his "management style" which he has struggled with.

The level of communication between

Superintendent West and High School Principal Allyn Monaghan is virtually nonexistent and has a detrimental impact on the operation of the Buffalo Center-Rake Community School District. The report of April, 1988, by the North Central Association evaluation team comments about the relationship between the Superintendent and High School Principal and the potential impact throughout the system. Some of the Board members became aware that Superintendent West was communicating with High School Principal Monaghan almost exclusively by written notes and also learned of Principal Monaghan's frustration over severe limitations on his authority to act as Principal. In light of the NCA report and the complaints by Principal Monaghan, Erling Aalgaard and Board member Gene Brass visited with

Superintendent West in November of 1988 and expressed strong concern about that relationship. Superintendent West indicated that he would try to do better. In the course of learning more about the poor relations between the Superintendent and Principal, the Board also learned that Superintendent West had directed Principal Monaghan, as he had with prior High School Principal Fahlk, to not attend any meetings of the Buffalo Center-Rake School Board and not to have any contact with any of the School Board members. When Principal Monaghan served as Athletic Director, he was limited in his ability to purchase athletic equipment and had no keys to athletic facilities or to the restrooms.

The lack of communication between the Superintendent and Principal was such that in September of 1988 the School

Board adopted a team management policy which was received into the record. It's obvious from this record that the team management policy was not followed by Superintendent West as it relates to Principal Monaghan. Monaghan had little if any input on interview of potential employees, equipment purchases, finances, teacher complaints, school decisions, etc. These matters were also noted in a general sense by the NCA report.

The incident with the Wirtjes family also deals with the relations between the Principal and the Superintendent. The record does not clearly establish that Superintendent West directly intervened on the part of the Wirtjes boy and at the request of the Wirtjes family. It does reveal, however, that an overagressive parent insulted the High School Principal by calling him and telling him that they

did want him to be Principal of their child and then calling Superintendent West and telling superintendent West that Monaghan would not be their child's Principal. By not explaining the "facts of life" to this parent, Superintendent West's actions did have the effect of undercutting the Principal and making the Principal feel unsupported by the Superintendent. It appears that Superintendent West accepted the statement from the parent and reiterated such a position to the Principal without giving the Principal any support or encouragement. A similar problem developed over the suspension of Alitza Julius by Principal Monaghan. The record shows that Principal Monaghan suspended her for three days at the end of the 1987 calendar school year. The record does not establish whether the Board policy

was correctly followed in this case by any of the parties involved but it does reveal that the affected family went to Superintendent West to undo the suspension implemented by Principal Monaghan and that West did readmit the girl to school without the knowledge or consent of Principal Monaghan. These actions by the Superintendent further serve to undermine the confidence of the High School Principal and would directly contribute to the breakdown in communication and trust between the Principal and Superintendent. As noted elsewhere, these problems between West and Monaghan have a deleterious impact on the school system.

Superintendent West concedes that there are problems between he and Principal Monaghan but lays the responsibility for these problems with

Principal Monaghan. In the opinion of the undersigned, both can take their fair share of the blame but it is the School Board that is free to choose how to resolve such a dispute or conflict as they see fit.

The Superintendent's management style of making decisions on his own is shown in the matter relating to the ice machine. The Superintendent purchased an ice machine for the School District without getting prior Board approval for the expenditure. The head cook was not aware of the acquisition either before or for a considerable amount of time after the purchase. The record establishes that the funds for the acquisition came from the lunch fund and the cooks didn't know anything about the use of lunch fund monies as they should have. This reveals a lack of communication not only between

the Superintendent and the School Board but also between the Superintendent and others within the School District. To be fair, however, this action is consistent with the Superintendent's "management style" that did serve him and the School District well for several years.

Superintendent West has, over the years, assumed more and more responsibility by doing more and more of the school activities himself. In doing these additional duties, he did not always communicate clearly to others what he was doing. In many cases, such an administrative or management style is very effective in that it gets the work done and gets it done promptly. However, such a style has a tendency to trample on others feelings, and is not always best in the long run for a large organization with lots of personnel, such as a school

system. Such actions tend to have a negative impact on morale as so many of Superintendent West's actions have done.

Termination proceedings often generate complaints about hurt feelings and other actions that may have innocently or unintentionally hurt or injured someone in years past. Furthermore, in our present day school system, a natural tension exists between administration and teachers by virtue of the development of teacher organizations, bargaining units, etc. Because of the natural different perspectives that exist between administration and teachers, teachers will frequently feel hurt or angered by the actions of an administrator and a reasonable argument can be made that a good administrator may, from time to time, necessarily hurt the feelings of or anger a teacher or a

group of teachers. The difficulty for any administrator is not crossing the line between natural and necessary differences and unnatural and unnecessary problems. Some of the allegations made in this hearing against Superintendent West would fall into the category of natural and necessary conflict between administration and staff particularly as it relates to teacher terminations, teacher evaluations, and bargaining negotiations. Unfortunately, not all of the complaints registered against Superintendent West by the teachers can be characterized as natural and necessary differences. There is in fact a staff morale problem at Buffalo Center-Rake that has been attested to by many witnesses. The staff morale problem has many causes but it is obvious from this record that the Superintendent's

inability to communicate with certain staff members and the Superintendent's inability or unwillingness to communicate with the High School Principal and to delegate responsibilities to the High School Principal is a key factor in the low morale amongst a sizable portion of the staff. The Superintendent has chosen to communicate by written memorandum and note not only to his Principal, Allyn Monaghan, but to other teachers who apparently appear to be in some disfavor with the Superintendent.

The dissatisfaction and low morale of the teachers at Buffalo Center-Rake got to the point where in the spring of 1989, a group of them asked to meet with certain Board members. The teachers complained of the lack of professionalism and communication by West directed toward them. Other complaints from staff

members were heard on an individual basis over a period of time. The Board members even talked to Superintendent West about some of these problems!

By some unknown process, Superintendent West was able to take the Athletic Director responsibilities from Principal Monaghan and give them to Mr. Miller and to remove Mr. Miller as head football coach without any direct or legal action being taken. These two situations further illustrate the management style of Superintendent West in that he chooses to run things his way because of the confidence that he has in his own ability to get things done. Unfortunately, this style of management tends to step on toes and demoralize others and sometimes has a tendency to run rough shot(*sic*) over finer rules and regulations. In other words, this

management style may not always do things the right way but it frequently gets the job done. With the increased legislation and regulation in our school system, frustration is likely to increase for an administrator because getting jobs done is usually more time consuming and more expensive. Unfortunately, this is what our law now requires in a modern educational system and the administrative style used by Superintendent West is simply not very effective today because of its corresponding negative consequences that we see so readily in this proceeding. What the school system gains by way of economy and efficiency with quick, abrupt and strong management ends up having negative consequences on legal niceties, staff morale, communications, relations, accountability and oversight.

The whole grade sharing agreement provides that Buffalo Center-Rake may borrow from Titonka the necessary equipment for an advanced physics class. Buffalo Center-Rake alleges that the heavy equipment for the class can only be used safely in conjunction with the utilization of certain heavy duty lab tables that were previously owned by the Titonka School District and used in their advanced physics class. Superintendent West advised the Titonka School Board that Buffalo Center-Rake wanted to purchase several of such lab tables from Titonka. He did so without any authority or direction from the Buffalo Center-Rake School Board. Buffalo Center-Rake felt that the tables should have been loaned to their School District as a part of the sharing agreement provision but the Titonka School Board maintains that this

was not the equipment contemplated in the sharing agreement. The Buffalo Center-Rake Board has never authorized Superintendent West to make any such purchase or representation co purchase and when they learned of Superintendent West's actions, they were upset with his actions. This Administrative Law Judge makes no finding as to whether or not such equipment is in fact the type of equipment contemplated in the whole grade sharing agreement but I do find that Superintendent West made a representation on behalf of the Buffalo Center-Rake School Board to the Titonka Board that was not authorized by the Buffalo Center-Rake School Board. Such action does give the School Board reason to lose confidence in their Superintendent, particularly in light of the history of those lab tables and their use by the

Titonka School District.

Another area critically affecting the relationship between the Superintendent and the School Board has to do with Superintendent West's entitlement to a $4,000.00 IRA for the past several years. Superintendent West's 1987-88 contract provided that he would be paid $4,000.00 in that year for an IRA (or similar tax savings annuity) and he was accordingly paid $4,000.00 at the beginning of the 1987-88 contract year. Sometime in the early part of 1988, he asked School Board Secretary Leona Van Hove to issue him another check for $4,000.00 for an IRA. The School Board Secretary contacted Erling Aalgaard, President of the Buffalo Center-Rake School Board, and Mr. Aalgaard and board member Gene Brass contacted Superintendent West, and

advised that a double payment in the school year would not made.

The School District then received a letter from the local bank asking that the 1988-89 $4,000.00 IRA be assigned to the bank so that it could be applied to a promissory note obligation that Superintendent West obviously had with the bank. This revealed to the School Board that Superintendent West was apparently not going to be utilizing the contractual provision regarding tax deferred annuities and tax savings devices for such tax savings but rather was going to utilize it for other income purposes. This would justify the School Board into believing that Superintendent West had misled them about the need for a tax savings program or tax annuity. An identical situation developed in 1989 in that Superintendent West asked the School

Board in June of 1989 for his $4,000.00 that was not due until July of 1989 for the 1989-90 school year. The Board declined to do so and so advised Superintendent West.

Another area causing a breakdown in communication between the Board and Superintendent West was the matter over the location of certain football practices at Buffalo Center-Rake School. In the fall of 1989, the administrators and coaches recommended that football practices be held at Buffalo Center-Rake yet the School Board learned that Superintendent West had indicated there was not adequate space for junior high football at Buffalo Center-Rake. This justifiably upset the School Board inasmuch as Superintendent West had previously told the Buffalo Center-Rake School Board that there probably would be

room to hold football practice there.

Another item impacting on the trust and confidence that the Board felt toward Superintendent West was the revelation that Superintendent West had told the School Board Secretary Leona Van Hove to sign a document that Superintendent West did not allow her to see. Although Van Hove signed the document when Superintendent West asked her to, she did talk to Board President Aalgaard about it and she was instructed never to do so again. Such actions by the Superintendent would justify the School Board in having doubts about the Superintendent.

Another area of contention at the hearing was over certain School Board policies about reimbursement for travel expenses outside and inside the School District. Although the School District

apparently adopted a policy regarding some of these issues in the fall of 1988, there appears to have been no clearly defined policy about reimbursement of staff prior to that time and there appears to be a lack of understanding or knowledge about the existing board policy. A lack of clear policy on this issue has created problems and concerns for the School District and its staff members. In this regard, the School Board must bear some of the responsibility since they are the body that is charged with the responsibility for formulating policy. However, it is not unreasonable for a School Board to expect their Superintendent to prepare those policies and bring those policies to the Board for approval. It may well be argued that the School Board should initiate these matters and direct the

Superintendent to prepare such policies but it should be the responsibility of the Superintendent to provide the School Board with feedback about areas of confusion about Board policy. Furthermore, some Superintendents will take the initiative and make specific recommendations about issues causing disruption and concern within the District. This was not done in the instant case by Superintendent West. The same analysis applies to the School District's contention on the issue of staff development classes and any resulting changes in pay lanes for teachers. There apparently is no written policy at Buffalo Center-Rake regarding pay lane changes although practice has been established and followed to some extent. By virtue of no written policy, however, differences in treatment and

confusion over the actual practice has arisen creating staff problems and concerns. These problems can be and should be avoided by a specific written policy and again the question arises as to whether it is the Board's responsibility or the Superintendent's responsibility to determine the need for such a policy and to take the initiative in formulating such a policy. Because of the alleged expertise and hands-on experience of the Superintendent, it is not unreasonable for the School Board to look to the Superintendent for information and feedback about such problems and to expect the Superintendent to bring these matters to the Board's attention for resolution. This was not done in the instant case.

The undersigned finds that the Superintendent did cause, for three

years, a false and inaccurate report to be made to the Iowa High School Athletic Association representing that Buffalo Center-Rake had a certificated head wrestling coach. The record shows that not only did Superintendent West authorize such reports to be made, he declined to alter the report when it was brought to his attention. This also has affected the Board's trust and confidence in the Superintendent.

The breakdown in trust and relationship between the Superintendent and the Board is established also by comments made by Superintendent West about the School Board and its members. The record establishes that Superintendent West has publicly made derogatory comments about the School Board by stating that it was the worst Board he had ever worked with and the

poorest Board in the state. The record further establishes that Superintendent West made derogatory comments about President Aalgaard and Board member Denny Wessels. These comments were made in public settings where others could easily overhear and where little if any discretion was exercised by the Superintendent. Other evidence establishing the breakdown in trust and relationship between the Board and the Superintendent is the letter written by Superintendent West to the School Board on May 31, 1989, where Superintendent West, among other things, suggests a potential suit for back wages against the school and threatens to have the School Board members removed or reprimanded because they were "overstepping their authority".

The evidence establishes that the

administrative style of Superintendent West, that being one of total control and involvement, also allowed Superintendent West to have too easy an access to school funds that were not always properly accounted for by Superintendent West. The testimony establishes that a $150.00 check was issued for the registration of three people for a meeting at the School Administrators of Iowa. Superintendent West later gave $50.00 in cash to the School Board Secretary and advised the School Board Secretary that one of the three people did not attend the meeting. The School Board Secretary later called Des Moines to inquire about the procedures and determined that a refund check had been mailed by the School Administrators of Iowa and had not been refunded in the form of cash. Leona Van Hove then requested that a copy of the

check be sent to the School District but the check and note were apparently intercepted by Superintendent West because Superintendent West wrote a note to Leona Van Hove indicating that he had received a check for the $100.00 refund and further acknowledged that he owed the school the extra $50.00 which he had not initially turned over. The documentation shows that the check from the School Administrators of Iowa to the Buffalo Center-Rake School District was cashed at a bank where the school does not do its banking and the stamp on the back of the check was a stamp for receiving mail and not for cashing checks. It was approximately two months from the time of the initial $50.00 refund that the School District received the remaining $50.00. Such actions by the Superintendent clearly justify the School Board in

losing trust and confidence in their Superintendent. Another series of incidents causing the School Board justifiable loss of confidence in their Superintendent was the action of the Superintendent in writing checks on the school activity account. The activity account contains monies for school classes, student counsel, basketball and football, cash for annual sales, ball games, making change, buying candy, concession receipts from games, etc. The Superintendent had developed a practice of writing checks to the activity account for cash and then receiving cash from the activity account. In writing such checks, he would instruct the School Board Secretary or others responsible for the account to hold the check for a period of time or leave a note to that effect. He would ask that checks be held

for two weeks on occasion. On some occasions, rather than having the check cashed, Superintendent West would write another check for a larger amount to not only cover the amount of the original check but also for additional cash and ask that the checks be held until pay day. Such actions justify the School Board in losing confidence and trust in their relationship with the Superintendent. Another financial dealing which concerned the Board and which is established in the record is the testimony by former Principal Fahlk wherein he testified that he gave Superintendent West $100.00 for a cub cadet. Superintendent West denied that he had ever received the $100.00 and no records were found to indicate a turnover of $100.00 by Superintendent West to the school for the cub cadet. This incident,

though somewhat old, is further reason for the School Board to lose trust and confidence in their Superintendent.

Superintendent West testified that he thought his relations with the School Board were good until November of 1989. The record, however, in inconsistent with such a contention in that Superintendent West's letter to the School Board in May of 1989 reflects a surprisingly high degree of conflict and the undated letter from Superintendent West to the Board, marked as Exhibit 11, reveals an awareness by the Superintendent that the School Board is getting information from someone that reflects poorly on Superintendent West. Superintendent West testified that he didn't think the School Board would know in that letter that he was referring to Allyn Monaghan yet this too is extremely difficult to believe.

The record reveals that Superintendent West's administrative and leadership style became out of favor with this particular Board and with others within the school system. Superintendent West was so accustomed to such a style that it was difficult for him to adjust and he reacted improperly in several ways over the declining loss of control. In an effort to fight to retain that control, Superintendent West would employ gruff mannerisms and uncommunicative attitudes. In addition, an occasional threat was also employed such as the threat to the School Board noted previously. Such tactics were also used with School Board Secretary Leona Van Hove as shown in two memos written by Superintendent West wherein he threatened to contact the State Attorney General's Office and have charges filed against

Mrs. Van Hove. These threats should have no place in an educational system. The similarity between that threat and the threat to the School Board conveys an attitude by Superintendent West that he might be able to convince lesser educated people that he can have them removed by some miraculous contact with the Iowa Attorney General. Such is clearly not the case.

It may be extremely difficult for any Superintendent to work with so many districts in a whole grade sharing arrangement such as exists with Buffalo Center-Rake and the other schools. Other School Boards and other administrators are involved and pacifying different Boards can be extremely taxing. Compounding this situation, at least for Superintendent West, is the fact that he not only works as Superintendent for

Buffalo Center but also for the Titonka District as well. This dual responsibility creates conflicting allegiances. These conflicting Boards and conflicting allegiances when coupled with an active and involved Board can make some problems almost insurmountable and some of the problems experienced by Superintendent West can be attributed to these conflicting demands. However, they do not justify, in the opinion of the undersigned, an excuse for all of the actions that I have found herein.

The NCA evaluation report concluded that there were concerns about the team management concept at Buffalo Center Rake and they felt that Superintendent West needed to begin to delegate more responsibilities including day to day equipment purchases, direction of staff, budgetary matters, staff selection and

staff communications. The NCA report also noted the potential for staff morale problems and took note of the staff complaints about lack of input and communication and communication with administration. The matters noted in the NCA report have also been testified to in various forms at the hearing and the undersigned does conclude that such problems do exist at the Buffalo Center-Rake School to a sufficient extent so as to give the School Board sufficient reason to seek a change in management style or administrative style and thereby change Superintendents.

It is within the School Board's prerogative to determine how to resolve this damaging conflict between the Principal and Superintendent and they are within their rights and it is within reason to change Superintendents as an

attempt to resolve the problems. The attempted resolution is supported by the finding elsewhere herein that the Board has reasonably lost confidence and trust in their Superintendent and no longer have sufficient communication with him.

Much of the superintendent's defense focuses on claimed violations of Constitutional and statutory law, violations of Board policies and rules, unlawful procedures, and other errors of law including violations of the Iowa Open Meetings Law. Unfortunately, this Proposed Decision will not address those contentions for the reason that an Administrative Law Judge does not have the authority to entertain and consider those types of issues at this level. Iowa Code Section 279.24 specifically grants a District Court Judge authority to review Board action to see if it

violated Constitutional or statutory provisions, exceeded its statutory authority, violated Board policy or rule, held unlawful procedures, or had other error of law. The statute, regrettably, does not permit an Administrative Law Judge to examine those issues at this stage of the proceedings. No authority has been presented to show this Administrative Law Judge that he has the authority to entertain those types of issues and a fair reading of the statute supports that conclusion. Administrative Law Judges are not required by law to be lawyers and therefore I conclude that the Iowa Legislature did not intend for Administrative Law Judges to rule on some of the many legal issues raised by the Superintendent at this stage of the proceedings. It may be that the inability of an Administrative Law Judge

to consider such issues does in fact create additional expense and time for the parties to have all issues resolved. However, I am convinced that an Administrative Law Judge's function is to present an objective and disinterested evaluation of whether or not sufficient reasons exist to terminate an administrator. It is important for a School Board to get such a disinterested and objective view point for the reason that School Boards work much closer with administrators than they do with teachers so and therefore it is difficult for a Board to be impartial and objective. The Administrative Law Judge's function is to provide an initial screening of the reasons alleged to see whether it is sufficient legally for a termination. The School Board may then adopt or reject the Proposed Decision and further

judicial review is available under the statute, by a duly appointed District Court Judge, who then not only examines the sufficiency of the reasons but also all of the other legal issues, procedural issues and Constitutional issues as raised herein.

Even though the undersigned has no authority to consider such issues in making a proposed decision, a few comments are, I believe, appropriate on some of the practices and procedures employed by the School Board.

The School Board's actions at the November 20 and the November 28, 1989, School Board meetings reveal a significant lack of understanding about the Iowa Open Meetings Law. It is surprising to find a public body that is not familiar with the requirements of the Open Meetings Law or at least

sufficiently aware of the law so as to consult an attorney before proceeding. It appears that there were numerous violations of the Iowa Open Meetings Law surrounding and relating to the November 20, 1989, School Board meeting as well as the November 28, 1989, Board meeting. A reasonable argument can be made that Superintendent West was not prejudiced by the actions of the School Board at the November 28, 1989, meeting since it was so brief and very little occurred. Unfortunately, that cannot be said with confidence about the meeting of November 20, 1989, where it appears that Superintendent West was evaluated. In this regard, the School District does have a Board policy that requires the approval and consent of both the Superintendent and the School Board for a Superintendent's evaluation. The

evaluation done by the Board on November 20 was done without any knowledge or input from Superintendent West. Had the Superintendent been contacted and invited to that meeting, perhaps many of these matters could have been avoided by an airing of grievances and a frank exchange of views at that time. However, the School Board chose not to do so and Superintendent West later took a stonewalling attitude and thus the School District now has to incur the time and expense of these lengthy proceedings. It's not altogether clear that a joint meeting on November 20 would have avoided these proceedings and it is not clear whether the proceedings on November 20 did actually prejudice the substantial rights of Superintendent West. Whether or not his substantial rights were prejudiced would depend upon many other

factors that will not be addressed herein. however, there may have been revelations and a sharing of information that would have resolved many if not all of the problems or at least resolve them sufficiently to have narrowed the focus of this hearing or delayed any action for another year or so. Unfortunately, the Board's actions on November 20, 1989, started a chain of events which entrenched the respective parties in an inflexible position which prevented any open discourse and possible reconciliation.

CONCLUSIONS OF LAW

Termination of a Superintendent need not be for "just cause". A decision to not renew a Superintendent's contract only requires the existence of a reasonable foundation to terminate which must be established by a preponderance of

the evidence. Iowa Code Section 279.24; IASB Certified Employee Contract Termination Procedure, page 167, 1989; Wedergren vs. Board of Directors, 307 NW 2d 12 (Iowa 1981). As the Supreme Court stated in the Wedergren case, "The necessary close relationship between a Board and a Superintendent requires utmost trust and confidence in the Superintendent". The Iowa Court of Appeals held in a just cause case entitled Cook v. Plainfield Community School District, 301 NW 2d 771 (Court of Appeals 1980), that just cause is a flexible concept and can arise from conduct which either directly or indirectly significantly and adversely affects the goal of the governmental body. It has been previously held that a Board of Directors of a School District is not married to mediocrity but may

dismiss personnel who are neither performing high quality work nor improving in performance. Although this is not a "just cause" case, it is clear that a School Board has the final say as to how best to resolve a disruptive situation provided there is a reasonable basis for their decision.

The record establishes that there has been a breakdown in communication between Superintendent West and the School Board, poor communications between Superintendent West and staff members, and that Superintendent West has lost the trust of the majority of the Board of Directors of the Buffalo Center-Rake Community School District. The School Board's loss of trust in the Superintendent is reasonable for the reasons set forth elsewhere herein and it is reasonable for the School District to

conclude that the interests of the Buffalo Center Rake School District will be served by a change in Superintendents. Accordingly, it is the opinion of the undersigned that a reasonable foundation exists to terminate the contract of Don West as Superintendent of the Buffalo Center-Rake Community School District. Therefore, it is the proposed decision of this Administrative Law Judge that Superintendent West's contract be terminated.

The costs of these proceedings, to be later certified by the undersigned Administrative Law Judge, are hereby assessed equally between the parties.

BEFORE THE BOARD OF EDUCATIONAL EXAMINERS

No Number Assigned

IN THE MATTER OF:
BUFFALO CENTER-RAKE
COMMUNITY SCHOOL
DISTRICT,

Plaintiff,

vs.

DON WEST,

Defendant.

MARCH, 1990
BOARD MEMBER
TESTIMONY

Board President Erling Aalgaard testimony:

Q. Now, we went through an entire laundry list of concerns, some of them by themself may seem rather inconsequential or even petty, but after considering all these matters as an entire unit, have you reached any conclusions yourself?

A. I would personally find it difficult to work with Mr. West on a -- in a close relationship, which needs to be done in these types of situations with the school board and the superintendent. I feel that he has betrayed our trust on several occasions, and that is essential to my feelings as to running the school system the way it should be. [3/90 Hearing tr., pp. 100-101, ALJ rec.]

* * * *

Q. If Mr. West were to continue as

superintendent, how do you think the rest of the board would view working with him?

A. I do think that it would be difficult. Because of the lack of trust and professionalism that has been exhibited over the last year or so. [*Id.*, p. 102.]

Board Member Denny Wessels testimony:

Q. I'm handing you what has previously been marked and identified as Exhibit 2. That's the notice of consideration of superintendents -- the termination of Superintendent West's contract. Were you the one that made this motion?

A. Yes, I did.

Q. How many reasons are set forth on that motion--

A. Ten....

Q. --for the termination?

A. Excuse me.

Ten.

Q. Has your opinion of any of those ten reasons for terminating Mr. West's contract changed?

A. I don't believe so.

Q. Would you care to just summarize

the reasons why you think Mr. West's contract should be terminated and why the board viewed his performance unsatisfactory?

A. Basically, in three areas. The lack of professionalism towards his staff and towards his board. Lack of communications, towards both his staff and his board. And I think in the board's opinion, the lack of his understanding of finances on how to run the school, and his priorities of finances. [*Id.*, pp. 571-572.]

Board Member Gene Brass testimony:

Q. Before we get into some details, what I would like to ask you to do is just give the judge just a general overview of what you perceive to be the problems that brought us here today.

A. The problems that we mentioned, ten -- the ten problems that we listed, the trust factor, the communication factor that we're concerned about. [*Id.*, p. 715.]

* * * *

Q. Do you feel that the present board can resume a working relationship with Don West.

A. No, we cannot.

Q. Why not?

A. I have to say that the trust

factor is the main thing that bothers me. And communication that has happened in the past.

Q. What's your present opinion as to the validity of the ten reasons given for considering the termination of Superintendent West's contract?

A. I'd say they're valid. [*Id.*, p. 721.]

Board Member Raymond Smith testimony:

Q. I've asked the other board members to do this. Could you just briefly summarize what you perceive to be the problems that brought us to this courtroom today?

A. I guess -- I don't know, I guess I feel it's a complete breakdown in communicaton(sic) between the board and Mr. West. There just doesn't seem to be a working relationship in existence at this point. [*Id.*, p. 734.]

* * * *

Q. Well, after confronting Mr. West with problems on November 28, December 18th, January 3rd, and January 10th, did you reach any conclusions?

A. Yeah. The conclusion I reached is that there was only one alternative and that was to, you know, give notice of consideration

BEST AVAIL

of termination. We attempted to communicate with him and it didn't happen.

Q. Are you familiar with the ten reasons that have been given?

A. Yes.

Q. Supporting the termination of Mr. West's contract?

A. Yes, I am.

Q. Do you have an opinion as to whether -- do you have an opinion as to the validity of those ten items at this time?

A. I think they're all valid at this point. [*Id.*, pp. 774-775.]

IN THE IOWA DISTRICT COURT
IN AND FOR WINNEBAGO COUNTY

No. 14161

DON WEST,
Appellant,

vs.

BUFFALO CENTER-RAKE SCHOOL DISTRICT, BY ITS BOARD OF DIRECTORS,
Appellee.

SUBSTITUTED APPELLANT'S BRIEF FILED 1/15/91

ABLE COPY

ARGUMENT

Division I

A TERMINATION DECISION UNDER SECTION 279.24, CODE OF IOWA (1989), MUST BE MADE BY A FAIR AND IMPARTIAL SCHOOL BOARD.

Pertinent portions of section 279.13, Code of Iowa (1973), read as follows:

> [T]he board may by a majority vote... cause said [teacher's] contract to be terminated by written notification of termination... provided, however, that at least ten days prior to mailing of any notice of termination the board... shall inform... that (1) the board is considering termination... and that (2) the teacher shall the right to a private conference with the board... [and] a written statement of reasons for considering termination... [if the teacher so requests,] the board shall, before any notice of termination is mailed... hold a private conference.... [If written notification of termination is given after the private conference,] the teacher shall have the right to protest the action of the board, and to a hearing thereon, by notifying... the board... in which

> event the board shall hold a public hearing... [emph. supp.]

In 1978, the Iowa Supreme Court concurred with the United States Court of Appeals for the Eighth Circuit that "[t]his statute was intended to provide non-tenured teachers with procedural due process." Keith v. Community School District of Wilton in the Counties of Cedar and Muscatine, 262 N.W.2d 249, 259 (Iowa 1978).

In Keith, the Iowa Supreme Court further concurred that minimal requirements of statutory due process dictated that the decisionmaker be fair and impartial "and that such right arises from section 279.13 itself." Id., at 259-262. In so concurring, it identified the following instances as those in which a decisionmaker is not fair and impartial:

(1) When the decisionmaker "has a special interest in the outcome... " of the case to be decided;

(2) When the decisionmaker has actual bias against the person whose case is being adjudged;

(3) When the decisionmaker acts as both prosecutor and judge;

(4) When the decisionmaker acts as both witness and judge, at least to the extent it has to adjudge its own credibility as a witness;

(5) When the decisionmaker "'has prejudged the case...'";

(6) When the decisionmaking procedure itself does not satisfy the appearance of justice because it offers "a possible temptation to the average person as a judge * * * not to hold the balance nice, clear, and true between the... " prosecutor and the accused. Id.

Notably, in identifying these unfair and partial instances, it specially excluded from them the instance of when the decisionmaker also served merely as preliminary investigator: "A vote to consider termination is not the equivalent of acting as prosecutor, judge, and jury." Id., at 261.

A year later, in a somewhat-different educational proceeding, but one in which impartiality was required, [albeit per constitutional due process], the Iowa Supreme Court further stated that:

> We have a special concern here regarding the requirement of an impartial forum. See Keith... This same board has once found Mr. Bishop unqualified. The board must, like a trial court on reversal, lay that finding aside. Any board member who harbors prejudice or predilection should recuse himself or herself. Board members possessing personal knowledge must place it aside or, if

> they are unable to do so, themselves step aside. Bishop v. Keystone Area Educational Agency Number 1, 275 N.W.2d 744, 752 (Iowa 1979) [emph. supp.].

Before its incorporation in the Code of Iowa (1977), section 279.13 was revised, so that sections 279.15-279.18 made, inter alia, the superintendent the person who brought a teacher termination consideration before the board and made the procedures for hearing and appeal much more detailed. Keith, supra, at 261; Briggs v. Board of Education of Fort Madison Community School District, 282 N.W.2d 677, 678-679, 682, 684 (Iowa 1979). Notwithstanding this revision, the Iowa Court of Appeals continued to hold that an impartial decisionmaker was required as a matter of due process, [although most likely constitutional]. Van Krog v. Board of Education of the Beaman-Conrad-Liscomb Community School

District, 298 N.W.2d 339, 344 (Iowa App. 1980). Of course, in this case, it also held that the initiation of the termination proceedings and the presentation of the evidence by the superintendent at a fairly-conducted hearing neutralized any impartiality on the part of the school board. Id.

In 1981, the Iowa Supreme Court passed upon section 279.24, Code of Iowa (1989), for the first time. Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981). Enacted in 1976 to cover administrator termination, [ch. 1149, §5, 1976 Iowa Acts], section 279.24 contained both similarities to and dissimilarities from the teacher termination provisions of section 279.13, Code of Iowa (1973), and section 279-15-279.18, Code of Iowa (1977):

(1) Similarly, all required the

furnishing of written reasons for termination;

(2) Dissimilarly, section 279.15 and 279.16 provided for the bringing and presenting of the case against the teacher by the superintendent, whereas section 279.24 provided for the bringing of the case by the board itself, but allowed the presentation of the case by the board's "legal representative";

(3) Similarly, all afforded the teacher and administrator notice and the opportunity to be heard;

(4) Dissimilarly, section 279.13 and its successor, section 279.15, provided for the hearing to be conducted by the board, as well as the termination decision to be made by the board, whereas section 279.24 provided for the hearing to be conducted by an administrative law judge, followed by the termination

decision to be made by the board.

In Wedergren, the Iowa Supreme Court did not determine whether the superintendent was entitled to statutory due process. It did not because it found he was entitled to constitutional due process. Wedergren, supra, at 16. This was so because the termination was attempted during the term of his contract. Id. Having done so, it stated that "[a] basic tenet of procedural due process is that a person is entitled to a fair hearing before an impartial tribunal." Id., at 17.

Thereafter in response to a two-prong impartiality challenge, the Iowa Supreme Court first reaffirmed the Keith precept that impartiality may not be presumed by prior investigatory activities alone:

In the performance of its duties,

> and in making the initial decision required by section 279.24 and .25 to consider termination, a board must necessarily be exposed to facts or allegations about the superintendent's conduct. In the absence of evidence that a board has prejudged the facts of the case, we will not find a denial of due process by the combination of investigative and adjudicative functions. Cits. Ordinarily, some exposure of a decisionmaker to facts in dispute does not automatically disqualify the decisionmaker on due process grounds. Id., [emph. supp.]; accord, Larsen v. Oakland Community School District, 416 N.W.2d 89, 95 (Iowa App. 1987).

With respect to the first prong, it then noted, as had the Court of Appeals in Von Krog, supra, that the presentation of all the evidence at a fairly-conducted hearing, the "later decision to terminate... be[ing] based solely on the record made at that hearing.... " eliminated any taint from the board's involvement at the investigatory stage. Id.

With respect to the second prong, it

reaffirmed that "an unconstitutional combination of prosecutory and adjudicative functions may occur where the individual who is responsible for presenting one party's case to a decisionmaker also acts as a decisionmaker." Id., at 18. In this case, however, the Iowa Supreme Court concluded that the board "did not actually act as prosecutor... [because] [t]he presentation of this case before the hearing officer was done by outside legal counsel." Id., emph. supp.; accord, Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 200 (Iowa 1990).

In 1983, the Iowa Court of Appeals "address[ed] the recurring constitutional issue; i.e. the allegation that Olds 'right to due process in his hearing before the Board was violated because it was biased against him." Olds v. Board

of Education of Nashua Community School District, 334 N.W.2d 765, 768 (Iowa App. 1983). As in Wedergren, supra, the impartiality issue was determined as a matter of constitutional, not statutory due process. Id. As in Bishop, supra, this issue involved the impartiality which can accompany a board rehearing a case after reversal. Id., at 767-769. On this issue, the Court of Appeals ruled that there was no impartiality under the following-described circumstances:

> Before the 1980 hearing began, Olds' attorney questioned all five board members separately and extensively, especially the three who were on the 1979 Board. Without exception, all members stated their ability to keep an open mind and that there was no reason why they could not decide the termination question impartially and only on the basis of the evidence to be presented later at the hearing. The three members of the 1979 Board were asked to consider carefully their ability to measure up to the Bishop guidelines; they concluded they could fairly decide the issue anew even though they were inclined

> to believe at that point that their 1979 decision was still correct. Olds gives us no reason to doubt the statements of the Board members other than his own belief that it could never impartially decide his case. We reject that belief and conclude his due process rights were not violated. Id., p. 769, emph. supp.]

After 1983, the impartiality issue has "recurred" only once in the chapter 279 context, and then only in the teacher termination context. Larson, supra. In this 1987 context, the Iowa Court of Appeals simply held that the modest fact that one board member previously had observed the teacher's teaching was insufficient as the only evidence of partiality: "The trial court determined there was no evidence that a member made a decision other than on the evidence presented at the hearing nor (sic) was there any evidence from which it could conclude the board was not fair and

impartial." Id.

As argued infra this Brief, West believes that his case implicates the protections of constitutional due process, particularly including the right to a fair and impartial decisionmaker. Nevertheless, even if it does not, he believes that his case at least implicates the protections of the same right by statutory due process.

As did section 279.13, Code of Iowa (1973), 279.24, Code of Iowa (1989), grants notice and a hearing. Thus, it "was intended to provide... procedural due process.... [and] [i]t is obvious... [West] too was entitled to an impartial decisionmaker.... " Keith, supra, at 259. Although every relevant opinion since Keith, [specifically including the singular §279.24 interpretation contained in Wedergren, supra], has been decided on

the basis of constitutional due process, there just is no reasonable ground upon which to distinguish the 1973 statute from the 1989 statute.

Furthermore, it is must not common sensical to think that the legislature would have gone to the trouble in section 279.24 of prescribing explicitly the due process embodied in the requirements of the specific reasons' statement, the neutral hearing officer selection, the hearing notice, the right to representation by counsel, the hearing reporting, and the holding of a hearing, without intending implicitly to complete these processes of submission to a fair and impartial decisionmaker. In other words, what would be the point of engaging in that much procedure, energy, time, and expense if the ultimate decision could be predetermined before

engagement?

Division II

THE SCHOOL BOARD IN THIS CASE DID NOT ACT AS A FAIR AND IMPARTIAL DECISIONMAKER.

The contract of a superintendent may be terminated only "by a majority vote of the membership of the board... " §279.24, Code of Iowa (1989). Here, "a majority vote" was 4, there being a Board "membership" of 7. Only 6 members voted for termination, Board member Kieweit having abstained. [Appendix, infra this Brief, pp. 39, 40.]

Of the remaining 6 members, West believes that at least 3, Smith, Wessels, and Aalgaard, were disqualified from voting ab initio, the 3 remaining being insufficient to constitute for "a majority vote". Of the 3 remaining, West

also believes that Hove and Brass were disqualified from voting as time passed, the 1 left assuredly being insufficient to constitute a "majority vote".

In 1975, the United States Supreme Court held as follows:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." Cit. This applies to administrative agencies which adjudicate as well as to courts. Cit. Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." Cits. In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudication... has been the target of personal abuse or criticism from the party before him. Withrow v. Larkin, 95 S. Ct. 1456, 1464, 421 U.S. 35, 46-47, 43 L. Ed. 2d 712 (1975), [emph. supp.]

Here, certain facts alleged by the Board as suporting its reasons to consider

termination were derogatory remarks allegedly made by West about Aalgaard and Wessels, [as well as a more general one about the stupidity of the whole board]. The Board evidence of these remarks showed they were "personally abusive and critical" and "targeted". The Board found these remarks to be fact.

Under these circumstances, Aalgaard and Wessels should have recused themselves from sitting in judgment of West. Although they well may have felt they could rise above any "personal stings" from West, Mayberry, infra, their personal feelings still were insufficient within the ambit of due process:

> Offcut does not fit this case, for the state judge in the instant controvery was not an activist seeking combat. Rather, he was the target of petitioner's insolence. Yet, a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so

> cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.... Many of the words leveled at the judge in the instant case were highly personal aspersions, even "fighting words" - "dirty sonofabitch", dirty tyrannical old dog," "stumbling dog," and "fool... " Insults of that kind are apt to strike "at the most vulnerable and human qualities of a judges' temperament." Cit. Mayberry v. Pennsylvania, 91 S.Ct. 499, 505, 400 U.S. 455, 465-466 (1971).

Here, if believed, [as apparently they were], statements that Wessels "cheated his way through college" and was "too dumb to pour piss out of a boot" and that Aalgaard "was power hungry" and "a tight screw" were clearly "[i]nsults of that kind". Id. As such, they provoked the "probability of unfairness", Withrow, supra, which precluded Wessels and Aalgaard from participating in the decisionmaking:

> In making this ultimate judgement the inquiry must be not only whether there was actual bias on

> respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interest of the court [school board] and the interests of the accused." Cit. "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. Taylor v. Hayes, 94 S.Ct. 2697, 2704-2705, 418 U.S. 488, 501, 41 L.Ed.2d 897 (1974).

Of course, the probability-of-unfairness rule of disqualification arises from a knowledge of human nature:

> The presumption of honesty is a presumption that officials will make every effort to act impartially and will disqualify themselves when they believe that this is not possible. The significance attached to the possibility of self-disqualification is an analogue of the significance of the presumption of honesty in assessing the risk of bias. Each depends on the adjudicator's ability to recognize and thereby prevent his biases from affecting his decision. Even if it is presumed that adjudicators will make every effort to be impartial and will disqualify themselves when they believe that this is not possible, the

> presumption of honesty should not be relied upon too heavily as a mitigator of bias.
>
> From different perspectives, adjudicators are both the best and the worst judges of their own biases. Because the individual adjudicator may be able to detect biases hidden to the outside world, self-disqualification is allowed. Because one's biases may be hidden from oneself, however, the safeguard of disqualification should not be a substitute for an inquiry into bias. Individuals may be reluctant to admit to themselves that their minds are closed on a subject, even more reluctant to admit it to others, and more reluctant still to announce it publicly.... Thus, although self-disqualification and the presumption of honesty may have some bearing on the risk of a biased adjudicator, they should not be heavily relied upon to insure fairness. Note, Due Process and the Combination of Administrative Functions: A Balancing Approach, 63 Iowa L.Rev. 1186, 1204-1205 (1978)

In Iowa, this rule has been adopted specifically for quasi-judicial tribunals:

> Canon 2 of the Code of Judicial Conduct provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his

> activities." (Emphasis added.) We believe the agency personnel charged with making decisions of great import, as in this case, should be guided by this rationale. Antsey v. Iowa State Commence Commission, 292 N.W.2d 380, 390 (Iowa 1980).

Smith too, [and Wessels, in conjunction with another ground for disqualifying him], were precluded by the probability of actual bias from participating in the decisionmaking. Smith's preclusion, however, was not the result of being the target of personal abuse or criticism from West, but was the result of Smith making West his political target.

Smith created the appearance of unfairness by activity uniquely analogous to the following:

> During the month before the hearing, defendant Mayes, made public statements in his campaign for election to the [school] board concerning Dr. Staton, [the superintendent]. In newspaper advertising Mayes stated that

> defendants Moore and Wade, [school board members], had publicly said that no progress could be made until there was a new superintendent, that he, Mayes, was pledged to seek a new top level administration for the schools, that from discussions with parents, teachers and citizens it had become apparent to him that the trouble lay with the superintendent, and that he would vote to make the necessary change.... It was Mayes who moved for the dismissal... Staton v. Mayes, 552 F.2d 908, 913 (10th Cir. 1977).

Moreover, the fit of the analogue holds even for Smith's testimony that he "tried to separate some" of his "reservations" about West from his school board "role". Comparatively, Mayes went even further by testifying "that he had not committed himself before hearing the evidence to vote for plainiff's dismissal and felt the decision had to be based on the evidence at hearing." Mayes, supra, at 913-914. The analogue also holds with respect to Wessel's service in Smith's campaign and statement to Hanna, these

placing him in the positions occupied by Moore and Wade. id.

The factual analogy, stronger if anything to West's position than it was to Dr. Staton's matches the preclusion advanced by West:

> The firm public statements before the hearing by defendant Mayes for the removal of Dr. Staton, and the discussions by defendants Moore and Wade as admitted, reveal a tribunal not meeting the demands of due process for a hearing with fairness and the appearance of fairness. Cits. These were not the mere statements on a policy issue related to the dispute, leaving the decisionmaker capable of judging a particular controversy fairly on the basis of its own circumstances. Cit. Nor was this simply a case of the investigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges. Cits.
>
> Instead this case involves statement on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical. Cit....

> We are mindful of the reference in the trial court's opinion to the testimony by each defendant that they voted to dismiss plaintiff based on the evidence presented at the hearing, and that plaintiff had failed to establish that he was denied procedural due process. While the defendants testified that they required proof at the hearing and decided on the basis of the proof, the evidence is uncontradicted on the making of several public statements by defendant Mayes for the removal of plaintiff and of unfavorable discussions by Moore and Wade as well. We are convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of the circumstances. Cits....
>
> We do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in the profession. Id., at 914-915, [emph. supp.].

Furthermore, even if the public statements made by Smith and Wessels were

deemed, [for some unperceived reason], less strong than those in Mayes, and even if the failure of Smith and Wessels ever to assert the Olds' disclaimer statements, [despite vigorous challenge by West's counsel during the ALJ hearing and particularly at the 4/26/90 private hearing], were overlooked, the subsequent conduct of Smith and Wessels was still unusually corroborative of their "uncontradicted" statements, id., at 914:

(1) It was Smith who, just as soon as he was sworn in, [at a meeting mysteriously called early], started the nitpicking of West's performance in which Wessels already was engaged.

(2) Within 45-60 days after Smith was sworn, it was he and Wessels who were violating Board policy by consulting with an attorney about "what the procedures would be if we ever wanted to make any

changes."

(3) Perhaps even before Smith was sworn in, it was Wessels who was deeply involved with Aalgaard's telephone networking of consensus against West, probably in violation of the open meetings law.

(4) At the illegal 11/20/89 closed session, it was Smith and Wessels who led the advocating and agitating against West, Wessels admitting near the end that he "really doubt[ed] that I can change my viewpoint.... " and who led the charge to take action immediately. [Appendix, infra this Brief, p. 15.]

(5) It was Smith who took it upon himself to visit West on 12/18/89 to inquire about resignation. It was then Wessels who at the 12/18/89 Board meeting asked West on the record if he had resigned yet, and when he received a

negative answer, moved, Smith seconding, to have a committee appointed to discuss resignation with counsel.

(6) It was Smith who professed to knowing how important board impartiality was in administrator termination proceedings, yet who was the major contributor to the formulation of the 1/10/90 questions, the main purpose of which were to prejudice West in everyone's eyes.

(7) It was Smith and Wessels who served as two of the mainstay witnesses against West at the ALJ hearing, Smith most frequently being caught, upon retrospective analysis, trying to stretch, exaggerate, or downright alter the truth to hurt West, [even to the extent of controverting other testimony and evidence presented by the Board].

The conduct of Smith and Wessels

which is corroborative of their appearance of bias by prior statement is also corroborative of their bias by prejudgment. Indeed, such prejudgment was demonstrated overwhelmingly in the record to have existed within Aalgaard, Hove, Smith, and Wessels prior to and by the end of the November 20, 1989 closed session and within Brass by no later than the end of the January 10, 1990 meeting.

Such prejudgment has the following circumference:

> Prejudgment is a preconceived point of view that affects the weight of evidence presented at the hearing....
>
> A trier of fact is charged with resolving adjudicative facts on the basis of a preponderance of the evidence presented. This requirement is premised on the notion that an impartial adversary hearing is the most accurate method for resolving adjudicative fact.... A preconceived view about adjudicative facts creates the danger that the adjudicator will not be persuaded by the weight of the

> evidence presented at the hearing sufficient to persuade the imparitial adjudicator. In other words, it creates the danger that the parties will not have a meaningful opportunity to persuade the adjudicator. Disqualification is therefore required if there exists an unacceptable risk that the preconceived bias of adjudicative facts will shift the burden of proof prescribed by law. Note, 63 Iowa L. Rev., supra, at 1193-1195.

In these proceedings, it should have been the Board's representative, not West, who had the burden of proof. Cf., Olds, supra, at 768; Board of Education of Fort Madison Community School District v. Youel, 282 N.W.2d 677, 680 (Iowa 1979).

As denoted previously, the rule pertains that Board members are not disqualified per se just because they conducted investigations, were exposed to evidence, or even formed impressions. Accord, Hortonville Joint School District No. 1 v. Hortonville Education Association, 96 S.Ct. 2308, 2314, 2316,

426 U.S. 482, 493, 497-498, 49 L.Ed.2d 1 (1976). However, Wedergren, supra, at 95, qualified this rule to say that it is operative only "[i]n the absence of evidence that a board has prejudged the facts of the case... " Here, the rule does not apply because there is practically no evidence that Aalgaard, Hove, Smith, Wessels, and later Brass did not prejudge the adjudicative facts against West:

(1) As previously discussed, Smith and Wessels evinced in the summer of 1989 their prejudgment that "West is the problem, he's got to go.... " {Tr., p. 1119.]

(2) As early as September, but probably by October, 1989, a consensus of 5-6 Board members was achieved "that Mr. West wasn't doin' an adequate job... " [Tr., p. 579.] Although testifying board

members frequently quibbled over the meaning of the term "consensus" its ordinarily-understood meaning is: "1: group solidarity in sentiment and belief 2a: general agreement: UNANIMITY... b: the judgment arrived at by most of those concerned... " Webster's New Collegiate Dictionary, pp. 238-239 (G.J.C. Merriam Co. 1979).

(3) During that same time period, Jensvold became aware that Aalgaard and Wessels "had a majority of the votes... [that is,] a consensus had been arrived at before the closed meeting, to the effect that the superintendent should be asked to resign.... " [Tr., p. 955.]

(4) At the illegal November 20, 1989 Board meeting, Aalgaard, Hove, Smith, and Wessels were not only doing most of the advocating of articulated facts and factual conclusions, they also

were driving the board into reaching "conclusions", a "decision", and a "consensus" and to "doing something". [Appendix, infra, pp. 1, 4, 8, 12, 15.] During this meeting, Smith stated his prejudgment that "I think we should ask for his resignation.... I don't know if anything ____can change." [Id., 11-12.] Near the end of the meeting, a Board member asked, "Is anyone going to change their viewpoint?" and no one answered in the affirmative, Wessels instead verifying that "I really doubt that I can change my viewpoint." [Id., p. 15.]

(5) At the illegal November 28, 1989 Board meeting, Aalgaard removed any lingering doubt as to what prejudgment had been reached by the majority, [Jensvold not attending this meeting]:

> It is the feeling of the majority of the board that conditions have deteriorated in our school system to

> the extent that a change needs to occur. Therefore, I must inform you, Don, that there is not support from the board to be able to renew your contract for another year. Our suggestion is, you submit your resignation effective on or before June 30, 1990, so that you and the board can make a transition in a timely and orderly fashion. [Id., pp. 19-20.]

Obviously, "renewal" of West's contract, prejudged as it was by this statement made without dissent, was the quintessential issue to be determined by the Board in the subsequent chapter 279 proceedings.

(6) At the January 3, 1990 Board special meeting, Aalgaard, Brass, Hove, Smith, and Wessels "deemed" West's "performance unsatisfactory, even though the numerical compilation and averaging of all 7 evaluations did not place his performance in that category and even though the stated purpose of the evaluation was "to give feedback" in

various areas, thus by inference not to achieve consensus judgment. [Ex. #31.]

(7) At the January 10, 1990 Board special meeting, Aalgaard declared the "firm resolve" impelling the Board to "reveal... the reasons for our action." [Ex. #1, p. 2, emph. supp.] Of course, what it "revealed" were questions, the West-unfavorable answers to which the Board majority accepted by presumption and nothing more. Quite naturally, the reasonable inference from the "action" reference and the answer presumption was that establishment of the facts for any purpose, [including for the more limited consideration purpose], was no longer important since a prejudgment of those facts had been made.

(8) At the ALJ hearing, 4 members or a majority of the Board ascended to the witness stand and gave their

prejudgment opinions that sufficient of the reasons and supporting factual incidents for termination were still valid to their satisfaction. [Tr., pp. 100-102, 571-572, 715, 721, 734, 774-775.]

(9) At the April 26, 1990 private hearing, the Board dispensed with any preparation of the ALJ evidentiary transcript, the very record from which they were supposed to have derived their decision. [4/26/90 tr., p. 2.] At the April 26, 1990 private hearing and in the Board's April 30, 1990 decision, no response was made to West's counsel's challenges to fairness and impartiality, including a specific request that the challenges be "answered when you answer, when you resolve this hearing matter... " [Id., pp. 3, 5, 7, 12-13.] At the April 30, 1990 illegal meeting, the Board spent

13 minutes in decisionmaking, none in deliberation of the facts, but rather in making endorsements of "the decision", [not seeing it as proposed], of the administrative law judge and the supplemental decision pre-prepared for their signatures. [Appendix, infra this Brief, pp. 41-45.] The reasonable inference from all these post-ALJ hearing proceedings is that at the very first time the Board actually was entitled to engage in decisionmaking, it felt it had nothing more to do.

As if the prejudging were not bad enough, Aalgaard, Brass, Smith, and Wessels compounded their abilities to be fair and impartial even further by becoming inextricably involved in the prosecution of the case, even to the extent of becoming the chief witnesses for the prosecution. Combined with their

permissible investigatory and initial consideration functions, they thereby impermissibly took on the prosecutorial/witness functions and thus voided any jurisdiction or authority of either the Board or the ALJ to proceed toward the termination decision:

> The petition for the writ of certiorari alleges lack of jurisdiction on the part of the Civil Service commission and questions the legality of the proceedings.
>
> Code, Section 5711, provides: "Jurisdiction-attorney-decision. The Civil Service Commission shall have jurisdiction to hear and determine all matters involving the rights of civil service employees, and may affirm, modify, or reverse any case on its merits."
>
> The power to "hear and determine" ks an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony offered by both sides; from a consideration of which the relief sought by the moving party is either granted or denied....

This record shows, without dispute, that the charges filed against Sandahl, were prepared and filed by the Civil Service Commission, the same body that under the statute was to "hear and determine" the case....

In the case at bar, the charges were filed by the Civil Service Commission. It was both the prosecutor and the judge.

Sandahl as a civil service employee of the City of Des Moines was entitled to a trial. Yes, a fair and impartial trial, by a tribunal that was open minded, that was not prejudiced by outside influences. We do not doubt the honest or the sincerity of the members of the Civil Service Commission, but they or no one else can both prosecute and fairly try one charged with an offense. Here we have a record where the Civil Service Commission made an investigation, what evidence was introduced does not appear. Then we find this Civil Service commission going before the grand jury seeking an indictment of Paul Sandahl. Then the charges were filed by the Civil Service Commission, which then held the hearing. Would anyone say, in face of such a record, that Paul Sandahl had a fair and impartial trial? That his rights as a civil service employee of the City of Des Moines had been properly protected?

> The Civil Service Commission had no authority to discharge Paul Sandahl without a hearing, and that hearing must be a fair and impartial one.
>
> To say under this record that Paul Sandahl had a hearing would be mere mockery. The verdict was ready to be rendered before the trial commenced. In the words of a member of the Civil Service Commission set out in this record, "We had Paul Sandahl convicted before he ever went before us for trial." Sandahl v. City of Des Moines, 290 N.W.2d 697, 698-699 (Iowa 1940), [emph. supp.].

Here, the Board no doubt will argue that it sanitized itself by hiring Lipps and presenting its case to an ALJ. This argument should fail, however, on fundamental precepts.

In the first place, the mere parroting of facially-proper procedure is not the same as the actual following of proper procedure. In one of the leading cases in which the usual compatibility of the investigative and decisionmaking

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functions was approved, the United States Supreme Court especially warned that: "Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." Withrow, supra, S.Ct., at 1468, U.S. at 54. Further, it acknowledged that initially-proper investigation can evolve into improper participation in the succeeding proceedings: "Clearly, if the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." Id., S.Ct., at 1470, U.S. at 58, [emph. supp.].

In the second place, neither Lipps,

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nor Aalgaard, Brass, Smith, and Wessels demonstrated any inclination whatsoever to separate themselves from each other or otherwise to segregate their respective functions:

(1) When Lipps was retained, sometime after December 18, 1989, the Board already was in deep trouble. The majority had committed itself to a prejudgment of the situation and the path to be pursued, which commitment had been hardened by public awareness of it. The majority, some of whom were well-educated and well-versed in the open meetings' law, also had participated in at least two meetings which constituted a gross perversion of that law. The majority further had violated its own policies on chain-of-authority and superintendent evaluations. Yet, despite these patent flaws of proceeding further, at least for

the upcoming year, Lipps did absolutely nothing to bake the out-of-control locomotive.

(2) Quite the contrary, Lipps jumped on board and fueled its boiler. He apparently counseled the Board to begin a series of superficial and overtly-orchestrated activities designed to scare West into resigning, to prosecute its prejudgment in the court of public opinion, to negate the positive evaluations which stood unblemished in the then-extant record, and to manufacture weight of evidence by the sheer number of accusations. He and the Board pursued this series jointly as a preliminary part of the prosecutorial strategy, fully cognizant of its use in the §279.24 proceedings to which they committed themselves in secret.

(3) As part of this strategy, the

special meetings on both January 3 and 10, 1990, were transparent manipulations. Without notice of more than a few days and notice apprising of more specifics, West was given no meaningful notice of an opportunity to defend himself. For the initial form evaluation, the majority and Lipps made up the rules as they went along. For the second evaluation, Smith drew and Aalgaard read the indictment after asking West to answer it sight unseen. In short, as can be seen readily in the 1/10/90 closed session tape recording, Lipps and the Board members were exceedingly active in prosecutorial strategy and not at all interested in the consideration which was supposed to be under advisement or the response they claimed post hoc to have been seeking in sincerity.

(4) After the §279.24 proceedings

were commenced, the jointly-implemented strategy was maintained as the mainstay of the prosecutorial presentation of the evidence at the ALJ hearing. Over and over again, Lipps distracted from the truth of the prejudgment which had been made by asserting and implying that the Board had remained open-minded, if only West had been willing to communicate with it. Moreover, hiding behind the sealed open meeting records, Lipps and his compatriots in the witness chairs glossed over in tandem their true motives.

(5) Additionally, the plethora of questions generated by Smith in an effort to prosecute its prejudgment before the court of public opinion became the outline of grievances against West. Of course, this scheme imposed upon West the hardship of having to prepare a defense to some 60-70 separate allegations, many

remote in time and amorphous in content. Even more importantly, it supplanted what might have been the legitimate sources of concern and inquiry, namely whether or how the Board could handle its own insecurity in sharing its superintendent and otherwise participating in the extraordinary, 4-way, whole-grade sharing agreement and whether certain Board members harbored ulterior motives, unrelated to the welfare of the children and their community.

(6) Furthermore, by working together as prosecutor and prosecutorial witnesses, Lipps, Aalgaard, Brass, Smith, and Wessels were able to place West in a no-win straightjacket before the ALJ. They did this by first filtering other incidents, [e.g., the I.R.A. request which had never distracted from good evaluation after they surfaced, certain

limited teacher complaints by a handful of malcontent, 3 of whom the Board had directed West to get rid of, so-called dictatorial acts of keeping staff from the Board, notwithstanding the 16-month age of such fact, even if true]. Then, these Board members were able to testify that they adjudged them to be true facts, ergo regardless of the actual truth, they became justifications upon which to abandon their trusting and communicative relationship with West, ergo they had a reasonable foundation upon which to terminate West.

Noticeably, it was exactly this kind of bootstrapping which was fatal to West in the proposed decision. As his only finding against West in the part of his proposed decision labelled as findings of fact, the ALJ found:

There has been a significant

> breakdown in the communication and trust between Superintendent West and the Buffalo Center-Rake Community School District Board. Each School Board member who testified at the hearing attested to such a breakdown or lack of trust between the Board and the Superintendent. [Proposed decision, p. 5, emph. supp.]

Almost as noticeably, the ALJ did not find as fact other alleged reasons for termination, such as unprofessionalism, dictatorial and intimidating management style, transaction of business without Board knowledge, action against Board policy, or inability to comprehend and manage school finances. In fact, the ALJ did not even find as fact the alleged reason for termination of an unsatisfactory evaluation, perhaps being sufficiently adroit as as to recognize that the January, 1990 evaluations were purely contrived.

(7) Despite certain adroitness on

the part of the ALJ, he nevertheless fell prey to the jointly-implemented prosecutorial strategy. He did not have time to study the nuances and contexts of the record, as hopefully has been done in this brief. Consequently, Lipps and his cohorts were quite successful in throwing enough garbage on West that, right or wrong, some of it stuck by mass of stickiness. The ALJ then proposed a decision, indubitably influenced strongly by the notion that the contract could not continue when 4 Board members testified that it could not continue. Thereafter it was a simple matter for these very same 4 Board members to endorse and incorporate the decision thus "influenced". They simply had to believe themselves, just as they had right from the time of their earliest prejudgment.

With this overview in mind, it

should be plain that even if the Board retained outside counsel and presented its case to an outside judge, Aalgaard, Brass, Hove, Smith, and Wessels, with the conspiratorial services of Lipps, still managed to subvert the process. That is, assuming arguendo or not that they did not participate actively and jointly in the prosecution with Lipps, minimally Aalgaard, Brass, Smith, and Wessels placed themselves in the very unholy position of self-judgment. This was a fundamentally-untenable position upon which to be ensconced:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this ~~end~~ no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome....
>
> It would be very strange if our

system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.... Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer....

As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his "grand-jury" secret session. His recollection of that is likely to weight far more heavily with him than any testimony given in the open hearings....

Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. In Re Murchison, 75 S.Ct. 623, 624-625, 349 U.S. 133, 136-138 (1955), [emph. supp.].

Under these circumstances even

granting great weight to the presumption of honesty and integrity due the hearing officer in these matters, I believe the combination of [prosecutorial and adjudicative] functions here creates an unconstitutorial risk of bias. The hearing officer in preparing to present the Department's case must become intimately familiar with its facts. In presenting the case he must act as an advocate and as such, he must seek to present the Department's case in the best possible light for the Department....

In my opinion, under these circumstances, a "realistic appraisal of psychological tendencies and human weaknesses:, cit., suggests that in the situation conferring both adjudicative and prosecutorial functions on the same individual poses "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Cit. Huber Pontiac, Inc. v. Alphin, 431 F.Supp. 1168, 1172 (S.D. Ill. 1977), [emph. supp.].

It is obvious from the emphasized portion of the quoted statement there are instances when a judge may or may not act as prosecutor, judge and jury. The Court in Murchison left open the question when a judge may not act in this manner. The question was

answered at the federal level in Wilson v. Lincoln Redevelopment Corporation, 488 F.2d 339, 342-343 (8 cir. 1973), as follows:

"* * * The critical determination here in assessing the charge of partiality of the decisionmaker is whether in weighing the evidence he is required to call on his own personal knowledge and impression of what occurred. In such cases, the tenant would be deprived of his right to examine or cross-examine a crucial witness and the decisionmaker would become the arbiter of his own credibility and fairness. Cits.

In the present case it was necessary for the board to call upon their own personal knowledge and impression of what Keith had done or had failed to do because there were no other witnesses. The board had determined here from the very start Keith's performance as a teacher was not up to the highest calibre. It then called upon itself to judge the credibility of its own determination as to Keith's performance. We cannot comprehend how a board in this position could do otherwise than find itself to be composed of credible witnesses. Keith, supra, at 260, [emph. supp.]

In this case, the main finding against West was the "significant

breakdown in the communication and trust" with the Board. The 4 Board members alone testified to that breakdown. They then found themselves to be "credible witnesses". As a matter of human nature, West never had a chance to persuade them otherwise. Accordingly, having been made to appear before an unfair and partial Board, "in violation of constitutional and statutory provisions... " his "substantial rights have been prejudiced... " §279.24, Code of Iowa (1989).

* * * *

Divison VII

SECTION 272A.8, CODE OF IOWA (1989), IS UNCONSTITUTIONAL TO THE EXTENT IT REQUIRED WEST TO PAY FOR THE EXPENSES OF HIS DUE PROCESS HEARING.

When an administrator requests an ALJ hearing under section 279.24, Code of Iowa (1989), he is required by section 272A.8, Code of Iowa (1989), to pay half its costs. Accordingly, section 272A.8 "is unconstitutional on its face because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right." Rankin v. Independent(sic) School District No. I-3, 876 F.2d 838, 841 (10th Cir. 1989). Regardless of the outcome of this appeal on other issues, West should be relieved of having to pay for the hearing the government constitutionally was required to afford him.

Division VIII

THE TERMINATION PROCEDURES IN SECTION 279.24 CODE OF IOWA (1989), ARE UNCONSTITUTIONALLY VAGUE AND THUS VOID.

Section 279.24, Code of Iowa (1989), establishes that there is a standard upon which the decision to terminate must be made. This standard arises from the statutory language specifying that there must be "specific reasons" stated "for" it. Id. In the case of "administrators, except superintendents", the standard is "for just cause". In the case of superintendents, the standard is "for" a standard not enunciated.

The United States Supreme Court has dealt with a similar statute. Giaccio v. State of Pennsylvania, 86 S.Ct. 518, 382 U.S. 518 (1966). In that case, a Pennyslvania statute directed a jury which had acquitted a defendant to "determine, by their verdict, whether the county, or prosecutor, or the defendant shall pay the costs... " S.Ct. at 519, U.S. at 400. The statute offered no

standard under which to make this determination.

Responsively, the United States Supreme Court declared this statute "invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs." Id., at 520, U.S. at 402. It held the standards were insufficient because the statute "contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs... " Id., S.Ct., at 521, U.S. at 403.

Here, the same problem exists within section 279.24. A school board is directed to determine whether or not a contract shall continue or discontinue. It is even required inceptively to give

specific reasons to be considered "for" discontinuance. However, it is not given any standard by which to locate the demarcation. School board members impermissibly "must make determination of the crucial issue upon their own notions of what the law should be instead of what it is." Giaccio, supra, S.Ct. at 521, U.S. at 403. Therefore, the termination procedures of section 279.24 are void for vagueness, and West's automatic renewal, which is severable, see, §4.12, Code of Iowa (1989), cannot be terminated.

DIVISION IX

THE SCHOOL BOARD APPLIED A NON-EXISTENT OR UNDEFINED STANDARD TO THE FACTS TO CONCLUDE THAT IT SHOULD TERMINATE THE AUTOMATIC RENEWAL OF WEST'S CONTRACT.

In its proposed decision submitted to the ALJ, pp. 11-12, the Board wrote:

> A School Board's decision for non-renewal of a Superintendent's contract only requires the reasonable foundation to terminate. Iowa Code Section 270.24; I.A.S.B. Certified Employee Contract Termination Procedure, p. 167 (1989), Wedergren v. Board of Directors, 307 N.W.2d 12, 20 (Iowa 1981).... The reasonable foundation test... is less stringent than the just cause standard...

West has examined the section 279.24 and Wedergren citations. After doing so, he has found neither the term "reasonable foundation", nor any indication of what "reasonable foundation" might mean, nor any indication that such "test... is less stringent", nor any indication that the standard to be applied should be "less stringent".

In his proposed decision, p. 27, the ALJ adopted the Board's standard and citations. He did not further expand the, but did quote from just cause language before stating that: "Although

this is not a 'just cause' case, it is clear that a School Board has the final say as to how best to resolve a disruptive situation provided there is a reasonable basis for their decision." [emph. supp.] This statement too is unsupported by citation.

In rebuttal, West argues that without authoritative foundation and on its face, the standard applied to the facts of this case neither exists nor has any meaning. As just one example of the difficulties in application, West asserts that it cannot even be ascertained from the Board decision whether "reasonable" means reasonable to an average citizen, reasonable to an educational professional, reasonable to an average school board member, or reasonable to some other benchmark person. Therefore, the Board's decision minimally has been

"[a]ffected by... error of law." §270.24(5), Code of Iowa (1989).

To some extent, of course, this argument is much like repeating the argument in the preceding division. That is, no one had any way of knowing what the standard was. Consequently, the Board and the ALJ could not possibly have been expected to apply one with any meaning and thus by ad hoc and murky rationale, just applied "their own notions" of an appropriate standard. Giaccio, supra, S.Ct. at 521, U.S. at 403. The difference, however, is that in this division, West does not argue that the statute is void, but rather that the Board erred by applying a standard with no meaning, with no lawful base, or both.

Beyond that argument, West alternatively assumes arguendo that an argument could be made that section

279.24 serves as some authority for derivation of a meaningful standard.

Under that assumption, he states that even though the standard for termination of superintendents is something different than "just cause", there is absolutely nothing in the relevant statutory structure to suggest, as the Board did without any citation, that it is "less stringent" than just cause. Quite the contrary, the pari materia statutory structure suggests, if anything, something more stringent.

Under chapter 270, Code of Iowa (1989), there is a definite hierarchy of procedural protection, vis a vis employment security. This hierarchy correlates almost identically to the commonly-perceived importance of positions within the school system, [as level of compensation also so reflects],

and to longevity of employment to some degree. The hierarchy is as follows:

(1) For non-certificated employees, there is no procedural protection at all, regardless of longevity. The janitors, cooks, and bus drivers have no guaranteed procedure by which to plead their cases.

(2) For probationary certificated employees, there is the protection of a "private hearing" before the school board, but no appeal to an adjudicator or court, "the board's decision... being final and binding... " §279.19, Code of Iowa (1989).

(3) For probationary administrators, there is the protection of a "private conference with the board to discuss the reasons for termination..." but again "[t]he board's decision to terminate a probationary administrator's contract shall be

final... " §279.24, Code of Iowa (1989).

(4) For non-probationary teachers, there is the protection of a full-blown "private hearing" before the school board, plus an appeal to an adjudicator on any of 3 grounds and an appeal to the court on any of 7 grounds. §§279.15-279.18, Code of Iowa (1989).

(5) For non-probationary administrators, there is the protection of a hearing such as for a non-probationary teachers, but with the further protection of it being first before the buffer of a hopefully-neutral administrative law judge whose decision favorable to the administrator can be allowed to stand. §279.24, Code of Iowa (1989). There is also the same kind of appeal from the board to the Court on any of 7 grounds. Id.

Although obviously there is no

graduation of procedural protection between superintendents and other administrators, [either up or down], that does not take away from the point that the overall structure for school employees is to grant greater procedural protections for employees as they climb the rungs on the employment hierarch. As a corollary then, it would seem that the higher an employee is in the hierarchy, the more substantial the reason should be before they are terminated: (a) non-certificated employees have little responsibility and may be terminated at any time for any reason; (b) certificated employees and administrators have more responsibility and may be terminated in a certain manner and only for just cause; and (c) superintendents have even more responsibility and may be terminated in a certain manner and only

for something greater than just cause.

Moreover, if the standard were not higher than just cause, it necessarily would have to be lower than just cause. Just cause is not that high a standard in the first place. Briggs v. Board of Directors of Hinton Community School District, 282 N.W.2d 740 (Iowa 1979). Accordingly, if lower than just cause, what would be the point of going through all the rigmarole of appointing an independent administrative law judge, hiring counsel, drafting findings of fact and conclusions of law, reporting the hearing, stating specific reasons, and appealing to this Court on any of 7 possible grounds if the superintendent simply was being afforded and opportunity to contest nothing much at all? Presumably, giving a superintendent a chance to argue the "stated reasons" were

not "reasonably foundationed " or reasonably based" could be accomplished just as well as it is accomplished when a(sic) administrator has "a private conference with the board to discuss the reasons for termination." §279.24, Code of Iowa (1989). It certainly would not require the rigmarole perceived as necessary for just cause, and presumably more.

IN THE SUPREME COURT OF IOWA

S.Ct. No. 91-1448

DON WEST,
Appellant,

vs.

BUFFALO CENTER-RAKE SCHOOL DISTRICT, By Its BOARD OF DIRECTORS,
Appellee.

APPELLANT'S BRIEF FILED IN APRIL, 1990

ARGUMENT

Division I

THE TRIAL COURT ERRED BY FAILING TO REQUIRE THE SCHOOL BOARD TO SUBMIT ITS ENTIRE RECORD.

This issue was preserved for review in West's motion seeking such submission. app., pp. 284-289. The scope or standard of appellate review is for correction of legal error.

As early as 9/89, but not later than 10/89, a majority of the Board clandestinely reached a "consensus" that West was not doing "an adequate job" as superintendent and should be asked to resign. app., pp. 145-151. In 10/89, one of the majority members, a Phi Beta Kappa college graduate, attended a conference in which the termination procedures, as well as the open meetings

law, were covered. app., pp. 151-152. In the first half of 11/89, half of this majority consulted with legal counsel to discuss how to terminate West's contract. app., pp. 156-157.

On 11/20/89, the Board met in a closed session preceded by no public notice of the same. app., pp. 161-162. Neither West, nor the public requested, consented to, or participated in this closed session. app., pp. 162-163. The Board was required to keep a verbatim record of its closed sessions. §21.5(4), Code of Iowa. During the ALJ hearing, the Board offered testimony which considerably downplayed the extent of discussion or decisionmaking which had occurred at this closed session. app., pp. 164-165.

By contrast, the transcribed verbatim record reflected that the Board

effectively had considered whether or not its continuing contract with West should be terminated. app., pp. 211-227. The members clearly were trying to "see what conclusions we can come to... [and were] looking into doing something about this matter at this time." app., p. 211, emph. supp. Moreover, they evinced the awareness that they might not be followed lawful procedure in formulating their plan to rid themselves of West, e.g.: "This can't be... an official vote or anything, but... " app., p. 222.

On 11/28/89, the Board again met in a closed session. app., pp. 171-179. During the ALJ hearing, the Board offered testimony which portrayed the members at this session as keeping an open mind about termination and as merely "suggesting" that West consider termination. app., pp. 172-175.

[Indeed, "suggested" was the very characterization employed by the trial court to describe the Board's action. app., p. 307.]

By bright contrast, however, the transcribed verbatim record reflected an outright fait accompli:

> It is the feeling of the majority of the board that conditions have deteriorated in our school system to the extent that a change needs to occur. Therefore, I must inform you, Don, that there is not support from the board to be able to renew your contract for another year. app., pp. 229-230, emph. supp.

This statement by the Board president, accompanied by the silent acquiescence of the majority members present, unequivocally demonstrated that by at least that date, consideration of termination had ripened into a decision of termination, not merely a suggestion of resignation.

On 12/18/89, the Board met in open

session. app., p. 182. During this meeting, West was asked if had resigned yet. app., p. 182. When West responded "no", the Board unanimously passed a motion creating a committee to consult with legal counsel. app., p. 182. The Board was required to keep the minutes which showed this exchange. §21.3, Code of Iowa. This committee seems to have formulated and investigated the charges against West. app., pp. 182-183.

On 1/3/90, on short notice, the Board specially met in open session. app., pp. 182-183. During this time, it pretended a pre-orchestrated, premature, and unsatisfactory evaluation of West, not in accord with its own policies. app., pp. 183-192. It also retained the counsel, ["Lipps"], who continued thereafter to implement the secret termination decision. app., pp. 182-209.

On 1/10/90, again on short notice, the Board unexpectedly and again specially met in open session. app., pp. 192-193. Although the subject had never been discussed publicly or been approved as a discussion topic, the following was listed on the Board's agenda: "Consideration of Terminating Superintendent West's Contract at the End of its Term (Non-Renewal)." app., p. 193.

The meeting again was pre-orchestrated and filled with many professions of the Board's open-mindedness. app., pp. 193-209. The orchestration apparently was engineered by the committee and Lipps. app., pp. 193-209. It revolved around extensive, widespread, and often-ancient questions which were designed to discredit West, regardless of whether or how he tried to

answer them, and which were impossible to answer in any case without notice and an opportunity to prepare. app., pp. 193-209. Nonetheless, at the ALJ hearing, the Board offered testimony to the effect that all the members really had wanted was a meaningful dialogue with West before determining whether to initiate termination proceedings. app., pp. 193-209.

After reading the questions, but before voting to consider termination, the Board went into closed session, purportedly to discuss with Lipps imminent litigation strategy. app., pp. 203-204. In stark contrast to its public posture, however, the Board members and Lipps discussed the success of their strategies to discredit West with the public, to intimidate West into resigning, and to stonewall the

advertised public forum. app., pp. 235248. They then went into open session, attempted one more intimidation, and stonewalled by immediately voting to consider the termination they long ago had fixed. app., pp. 203-209.

On 1/29/90, the Board issued a formal notice of termination to West. app., p. 32. On 4/30/90, at the end of the formal administrative proceeding initiated on 1/10/90, the Board again retreated into closed session, supposedly "to deliberate and decide whether or not to terminate", supposedly on the evidence in the administrative record and on West's 4/26/90 exceptions. app., pp. 58-62. In sharp contrast, however, the Board spent a minimal 13 minutes avoiding the evidence and the exceptions and scheming how to speed up the foregoing termination conclusion with an immediate

removal of West. app., pp. 58-62. With minimum comment, they also approved and signed a pre-prepared decision by Lipps. app., pp. 58-62. Of course, they could not discuss an evidentiary record which they never had transcribed and which no members had witnessed completely during the hearing process, some members not at all. app., p. 57.

With the preceding backdrop in full view, the trial court determined that it would not require the Board to submit for its review any record which antedated the 1/29/90 termination notice. app., pp. 293-294. Thereby, it effectively eliminated from consideration the 11/20/89, 11/28/89, and 1/10/90 Board closed session verbatim records, as well as the 12/18/89 minutes. app., pp. 293-294. It also determined that it would not require the Board to submit for its

review the 4/30/90 closed session records. app., p. 294.

The expressed presupposition for these determinations was the trial court's conclusion that its review was limited to "the board action" described in the section 279.24, unn. ¶¶13, 14, Code of Iowa, and that "action" was construed "to mean the decision of the Board to terminate... " app., p. 293. Notwithstanding its self-limitation to the decision, however, it then proceeded to hold "that the logical starting point for" reviewing the decision was looking at the record compiled subsequent to the vote to consider termination. app., p. 293. Unfortunately though, beyond an inapposite Wedergren citation, it really gave no insight into why the point it selected to start the record was "logical". app., pp. 293-294.

The term "board action" is undefined in section 279.24, but there is an analogue in chapter 17A, Code of Iowa. such analogues having been recognized judicially. See e.g., Board of Directors of Fairfield Community School District v. Justmann, 476 N.W.2d 335, 338 (Iowa 1991); Briggs v. Board of Directors of Hinton Community School District, 282 N.W.2d 740, 743 (Iowa 1979); but see, Jones v. Loess Hills Area Education Agency 13, 319 N.W.2d 263, 264 (Iowa 1982). The analogue reads as follows:

> "Agency Action" includes the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceeding, investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so. §17A.2(9), Code of Iowa, [*emph. supp.*].

Such "action" has been defined

expansively: "We believe it is so embracive that there is little the Board could do which would be excluded." Allegre v. Iowa State Board of Regents, 319 N.W.2d 206, 208 (Iowa 1982). Obviously, "action" is not limited to the decision alone. That is, it also includes the "proceedings" and related "duty performances or failures" inhering in the final decision, viz. "the continuance or discontinuance of the administrator's contract.... " notification of which triggers the statutory time for appeal. §279.24, unn. ¶¶12, 13, Code of Iowa.

Of course, as previously noted, even though the trial court held that action meant decision, it also included in its meaning all those proceedings between the written notification that termination was being considered and the written

notification that termination had been decided. Thus, the battle line now exists along the lines of the "logic" the trial court alleged, but never explained.

In major part, appellate review here is for the purpose of determining the lawfulness of the Board's proceedings. §279.24, unn. ¶14(1)(2)(4)(7), Code of Iowa. Such proceedings commence when "the board determines that it should consider the termination of a nonprobationary administrator's contract... " §279.24, unn. ¶4, Code of Iowa. They are the only proceedings by which such a continuing contract can be terminated. Id., unn. ¶1. Once the proceedings are commenced, "the following procedure shall apply.... " id., ¶4, [emph. supp.]. "'[S]hall' imposes a duty." §4.1(36)(a), Code of Iowa.

The "following procedures" embrace

specified due process requirements prior to the Board's formulation of the termination decision. §279.24, ¶¶5-11, Code of Iowa; see also, Keith v. community School District of Wilton, 262 N.W.2d 249, 258 (Iowa 1978); Kruse v. Board of Directors of Lamoni Community School District, 231 N.W.2d 626, 630-631 (Iowa 1975). Even if it subsequently affords the due process procedure specified, when a board makes a decision to terminate without first affording such procedure, the decision to terminate is still unlawful and invalid. id., at 632-634.

Here, the trial court was well aware that West frequently had protested the Board's unlawful procedure, [or should have been if it truly had "reviewed the entire record on file... " as represented, app., p. 295]. As one of

many examples, at the 4/26/90 hearing before the Board, West's counsel had denoted that by deciding and orally communicating its decision to terminate before formally voting to consider to terminate, the Board "in essence reversed the statutory procedure for terminating an administrator... " app., p. 58. Such protests appeared in the record that the Board had been willing to submit. app., p. 58.

Moreover, by foundationed tender, the trial court further was confronted with verbatim proof that no later than 11/20/89, the Board had determined to consider termination. app., p. 286; see also, Dillon v. City of Davenport, 366 N.W.2d 918, 922 (Iowa 1985), [decision may be reached by "consensus of opinion"]. Therefore, from all that was in its plain view, the trial court was

not at all "logical" in starting the record for review at any place other than from the point at which the Board actually decided to consider termination. This was the point of beginning. This was the point at which at least the review under Kruse, supra, had to begin. See also, division VII, infra.

Likewise, it was not at all "logical" to exclude any portion of the proceedings thereafter. The trial court's cited authority does not stand for the proposition that the record of what happened at a closed session is irrelevant or immaterial to issues raised, such as whether the Board acted as an impartial decisionmaker or violated the open meetings law or its own policy. Wedergren v. Board of Directors, 307 N.W.2d 12, 18-19 (Iowa 1981). As the Supreme Court has held, "[w]hile section

28A.5 provides specific direction concerning the preservation of the occurrences in a closed session and details the extent to which the minutes may be disclosed, it does not specify that the discussions acquire the status of confidential communications which are privileged from any use other than that specified." Dillon, supra, at 921.

Furthermore, if the 4/30/91 session was in fact a "private hearing not subject to chapter 21.... " §279.24, unn. ¶10, Code of Iowa, [a proposition of some doubt], then any "record" of it was merely "exempt from the provisions of chapter 22." id., unn. ¶12. Being "not subject" and "exempt", this document resultingly was neither a sealed closed session record, not a public record, nor a confidential public record. §§21.5(4), 22.1, 22.7, Code of Iowa. It was simply

a record of the proceedings, unencumbered by any statutory restrictions.

In reality then, the 4/30/90 recording and detailed minutes were no different than the written termination decision and the 4/26/90 private hearing transcript which also were "not subject" and "exempt". §279.24, unn. ¶¶10, 12, supra. Accordingly, it seems extremely telling that the Board had no hesitation to submit and the trial court had no hesitation to review and reply on the decision and the 4/26/90 transcript, yet both violently resited the submission of a record of equal status which lent to the disclosure of the true, albeit distorted decisionmaking process. Apparently, the truth was a little interest to either the Board or the trial court.

Division II

THE TRIAL COURT ERRED BY FAILING TO PERMIT THE SUBMISSION OF FURTHER EVIDENCE AND BY REQUIRING EXCISION OF ANY REFERENCES TO SUCH EVIDENCE IN WEST'S BRIEF.

In division I, supra, West argued that proof of what transpired after the Board started considering termination of his continuing contract was per se part of the record for appellate review. In this division, he further argues that even if such proof was not per se part of the record, it should have been permitted to become part of the record. This issue was preserved in the following-described parts of the record.

When West sought to compel a production request for the 11/20/89 and 11/28/89 closed session tape recordings,

the ALJ held that he did "not have the authority to order the production and/or disclosure of the minutes or tape recordings... for the reason that only a District Court of Iowa may do so... " app., pp. 34-35. During the hearing, when West again tried to compel production, he again was rebuffed for approximately the same reason. 3/14-15/90 hear. tr., pp. 152-159,235-237, tr. ct. rec.

When, however, West subsequently sought to submit evidence of the closed session tape recordings on appeal, app., pp. 8-17, the trial court created a "Catch-22". It held that since it had only appellate jurisdiction, it too did not have the authority to receive any evidence. app., pp. 19-20.

The trial court further held that even if it had the authority, it would

exercise discretion not to receive additional evidence because West had "had full and adequate opportunity to develop his factual record in the administrative proceedings below." app., p. 20. Needless to say, in light of the record, West was surprised greatly by this holding.

West next tried to correct the trial court's seeming misapprehension of the record by highlighting the impossibility of placing the later 4/30/90 record in evidence at either the earlier 4/26/90 private hearing or at the earlier 3/14-15/90, 3/22-23/90, or 3/29-30/90 ALJ hearing. app., p. 22. He further brought to the trial court's attention the places in the record where he had attempted unsuccessfully to compel production of the earlier records. app., pp. 23-24.

In resistance, the Board supposed that these records were not relevant and could be used and obtained by West only in a §21.6 enforcement proceeding, and hypocritically denied "that it has misrepresented the record of the closed meetings." app., p. 272. It also moved to strike West's brief because it contained an appendix of and references to the record, [the submission of which West had assumed would be allowed]. app., pp. 270-271. In reply, West outlined the relevance of the records offered. app., pp. 273-279.

In spite of West's presentations, the trial court doggedly stood by its prior position that West had had an adequate opportunity to present this evidence in the administrative proceedings, [even apparently the 4/30/90 record which had not then been in esse].

app., pp. 280-282. It supported this position by observing that since West had been permitted to question Board members and could have obtained the records by discovery if he had commenced a §21.6 lawsuit, there had been an "ample opportunity". app., pp. 280-282. It further concluded that the tape recordings were irrelevant in any event. app., p. 282. Finally, Judge Mackey forced West to the unnecessary expense of revising his comprehensive brief, so as to excise all hint of the evidence disallowed. app., p. 283.

Because of the trial court's alternate holdings, the scope and standard of appellate review is both for correction of legal error and abuse of discretion.

The trial court did not analyze section 279.24 in any palpable way.

Rather, it twice mouthed the naked notion that it could not receive evidence because it exercised only appellate jurisdiction. app., pp. 19-20, 280-282. Such a notion, however, was no substitute for a displayed rationale and certainty was no response to the analysis conveyed by West. See, app., pp. 8-17.

West's analysis was and is as follows. See, app., pp. 8-17. Unlike contested case and teacher termination proceedings, section 279.24 neither defines the record to be compiled, nor circumscribes the record to be reviewed by the district court. Compare, §§17A.12(5)(8), 17A.19(7), 279.15-279.18, Code of Iowa. Further, section 279.24, unn. ¶14, is virtually identical to section 279.18, unn. ¶2, except that it does not prohibit the district court from hearing further evidence or empower it to

remand for the taking of further evidence. The exception in these pari materia statutes thus implies "that a change of meaning was intended." Singer, 2A Sutherland Statutory Construction, §§51.01, 51.02, 59.02 (Sands 4th Ed. 1984 Rev.); Barnes v. Iowa Department of Transportation, 385 N.W.2d 260, 262-263 (Iowa 1986).

The most likely "change" inferable is that because of the purposeful ommission, the district court may do that which it is not prohibited from doing, namely take additional evidence. As a corollary, it is noted that statutory delineation of the record and delimitation of the review to that record were significant components of a statutory construction prohibiting additional evidence. Council Bluffs Community School District v. City of

Council Bluffs, 412 N.W.2d 171, 172-174 (Iowa 1987). Consequently, it may be deduced that without those components, there would have been no prohibition. id.

Furthermore, permissive §279.24 construction is buttressed by the distinction between use of the term "judicial review" in sections 17A.19 and 279.18 and use of the term "appeal" in section 279.24. In education law, appeal has connoted an evidentiary hearing on appeal from a school board decision. §§290.1 et seq., Code of Iowa.

Alternatively, the omitted language and the use of the term "board action" in section 279.24 may not imply an unlimited receipt of additional evidence. Rather, it may imply a power similar to that "[i]n proceedings for judicial review of agency action, [not contested case, in

which] a court may hear and consider such evidence as it deems appropriate." §17A.19(7), Code of Iowa. Ironically, such an implication brings the argument around full circle to the division I concept that the whole record of the procedures actually pursued by the Board, as well as the actions actually taken, should have been subjected t o review:

> We reject the contention that the language of section 17A.19(7) authorizing a court to hear and consider "such evidence as it deems appropriate" provides authority to challenge "other agency action" based on a claimed absence of substantial evidentiary support. The taking of evidence in the district court pursuant to the quoted language must, we believe, be for the limited purpose of highlighting what actually occurred in the agency so as to facilitate the court's search for errors of law or unreasonable, arbitrary or capricious action. Cit. Such evidence is not to be utilized to demonstrate that the agency's action is unsupported by substantial evidence in the record made before the agency. Sheet Metal Construction of Iowa v. Commissioner

of Insurance of State of Iowa, 427 N.W.2d 859, 867, fn. 3 (Iowa 1988).

Regardless of the statutory construction and the record composition rules which are adopted ultimately, West asserts that the trial court's attitude to the receipt of the proposed evidence is quite appalling. At every turn, Judge Mackey seemed most intent on punishing West and/or his counsel, even to the petty point of dictating the brief revision of evidence references which easily could have been disregarded, in the same manner equity courts disregard evidence taken subject to objections. Even more ominously, this attitude seemed to have been intent on stifling the truth with technicalities.

It just does not make sense to postulate that West could have commenced a §21.6 enforcement proceeding for the

purpose of discovering the closed session tape recordings, [or should have had to do so]. Even if incurring the expense and entanglement of further litigation should be a superintendent's obligation, there is no likelihood that this litigation would produce the recordings in a timely fashion. Although time was extended here by cooperation, the statutory scheme for termination does not contemplate that there usually would be sufficient time to pursue a §21.6 litigation. Jones v. Loess Hill Area Education Agency 13, 319 N.W.2d 263, 264 (Iowa 1982). Moreover, West could not have known about the extensions which occurred as the case progressed, except by crystal ball. He should not be prejudiced in the future by hindsight.

Furthermore, in such an enforcement proceeding, a superintendent cannot

advance his own need for the tape recordings and detailed minutes in the §279.24 proceeding. §21.5(4), Code of Iowa. Rather, all he can advance is the "probative value [of them] as evidence in the enforcement proceeding [itself].... " and then only after weighing that value against "the prejudicial effects to the public interest of the disclosure... " Such a standard hardly affords him personalized relevancy and materiality arguments.

Similarly, it does not make sense to postulate that because West had an opportunity to examine Board members about what occurred at the closed session, he had been afforded an adequate replacement for the best evidence recordings. At the time of the ALJ hearing, West had no means of knowing or testing whether Board members were

portraying accurately the 11/20/89 discussion. Indeed, it happened that they were not. Patently then, testimonial confrontation alone was not adequate.

Finally, it did not make sense for the trial court to put on blinders, by excision and otherwise, under the guise of irrelevancy. On their face, the closed session records demonstrated that the Board considered and decided termination before invoking the procedure required by section 279.24. On their face, the closed session records demonstrated actual prejudgment by the Board of the termination issue. On their face, the closed session records demonstrated violations of the open meeting statute, as well as Board policies on the same. On their face, the closed session records demonstrated

violations of Board policies concerning superintendent evaluation, chain-of-command, etc. On their face, the closed session records demonstrated how the Board had maneuvered to manufacture the charges against West, so as o manipulate the politics of the situation.

Ergo, it seems painfully apparent that this critical evidence, cum record, was so extremely relevant that if the trial court did not perceive such relevancy, it either willed itself to ignore the evidence, as well as the connected issues favorable to West, or committed blatant errors of legal misperception.

Preface to Divisions III - VIII

Throughout the administrative proceedings, West repeatedly challenged the Board for not acting as a fair and impartial tribunal. app., pp. 36, 38-40,

42-43, 56-58. Despite these challenges, the Board neither denied them, nor made any response to them in the record, [including in its formal decision]. app., pp. 58-61. Before the trial court, West perpetuated the challenges. 1/15/91 brief, div. I & II, tr. ct. rec.

To the extent the challenges envelope constitutional issues, they "require an independent evaluation of the totality of evidence from which the assertion of unconstitutionality arises. Evidence relevant to that issue is reviewed do novo." Iowa - Illinois Gas and Electric Company v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987). Otherwise, the appellate court reviews for correction of error, thereby applying the standards of section 279.24, Code of Iowa.

Citing Wedergren, the trial court

seems to have assumed that West had a constitutional due process right to a fair and impartial tribunal. app., p. 311. As argued in division VIII, infra, West concurs that such a right exists. However, he also distinguishes that Wedergren served as no basis for the assumption.

West's case involves the non-renewal of a continuing contract. The cited authority, on the other hand, involved the termination of a stated-term contract. Wedergren v. Board of Directors, 307 N.W.2d 12, 15 (Iowa 1981). Under past interpretations of Iowa property law, there have been no constitutional due process rights made available in a contract non-renewal proceeding. Keith v. Community School District of Wilton, 262 N.w.2d 249, 257 (Iowa 1978).

Even though no constitutional due process rights have been made available, nonetheless, statutory due process rights have been implied in the analogous teacher termination law, sections 279.15-279.18, Code of Iowa. Keith, supra, at 259-262. Consequently, given that both the teacher termination provisions and the §279.24 provision require notice detailing reasons and an opportunity to prepare and be heard, there appears to be every reason to assume the same implication may be made in §279.24.

One of the implied rights is the right to a fair and impartial decisionmaker. That right is deemed violated in the following situations:

(1) When the decisionmaker "has a special interest in the outcome... " of the case to be decided;

(2) When the decisionmaker has actual bias against the person whose case is being adjudged;

(3) When the decisionmaker acts as both prosecutor and judge;

(4) When the decisionmaker acts as both witness and judge, at least to the extent of adjudging its own credibility as a witness;

(5) When the decisionmaker "'has prejudged the case... '";

(6) When the decisionmaking procedure itself does not satisfy the appearance of justice because it offers "a possible temptation to the average person as a judge * * * not to hold the balance nice, clear, and true between the... " prosecutor and the accused. id.

However, the right is not deemed violated in the situations in which a decisionmaker acts as a preliminary investigator or is charged with the responsibility of prosecution, but retains another to prosecute. id., at 261; Wedergren, supra, at 200. In such situations, the decisionmaker is entitled to a presumption of honesty and objectivity which may not be rebutted by the "mere exposure to evidence" or to

prosecutorial activities outside the proceedings. Wedergren, id.; Van Krog v. Board of Education of the Beaman-Conrad-Liscomb Community School District, 298 N.W.2d 339, 344 (Iowa 1980); Larson v. Oakland Community School District, 416 N.W.2d 89, 95 (Iowa App. 1987); Hartwig v. Board of Nursing, 448 N.W.2d 321, 324 (Iowa 1989); Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 200 (Iowa 1990); Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236-237 (Iowa 1991); Fairfield Community School District v. Justmann, 476 N.W.2d 335, 339 (Iowa 1991).

Such a presumption may be rebutted by a showing of actual bias or of an unacceptable risk of actual bias. id. Further, "[i]n construing our state due process clause, we have also adopted a presumption of objectivity in decision

making among administrative adjudicators, which is, however, somewhat more easily rebutted than the presumption utilized by the federal courts." Justmann, supra, at 339-340. With regard to both the presumption and the risk, a decisionmaker must make a self-examination for bias and consider disqualification. Bishop v. Keystone Area Education Agency Number 1, 275 N.W.2d 744, 752 (Iowa 1979). Further, such a decisionmaker should make a record statement concerning whether or not this has been done, the statement and presumably lack of it both being probative. Olds v. Board of Education of Nashua Community School District, 334 N.W.2d 765, 769 (Iowa App. 1983).

The presumption of bias from certain identified risks of bias is afforded as a counterweight to the presumption of objectively because:

Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." Cit. This applies to administrative agencies which adjudicate as well as to courts. Cit. Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." Cits. In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Withrow v. Larkin, 95 S.Ct. 1456, 421 U.s. 35, 46-47, 43 L.Ed. 2nd 712 (1975), [emph. supp.].

* * * *

The presumption of honesty is a presumption that officials will make every effort to act impartially and will disqualify themselves when they believe that this is not possible. The significance attached to the possibility of self-disqualification is an analogue of the significance of the presumption of honesty in assessing the risk of bias. Each depends on the adjudicator's ability to recognize and thereby prevent his biases from affecting his decision. Even if it is presumed that adjudicators will make every effort to be impartial and will disqualify themselves when they believe that this is not possible, the

> presumption of honesty should not be relied upon too heavily as a mitigator of bias.
>
> From different perspectives, adjudicators are both the best and worse judges of their own biases. Because the individual adjudicator may be able to detect biases hidden to the outside world, self-disqualification is allowed. Because one's biases may be hidden from oneself, however, the safeguard of disqualification should not be a substitute for an inquiry into bias. Individuals may be reluctant to admit to themselves that their minds are closed on a subject, even more reluctant to admit it to others, and more reluctant still to announce it publicly.... Thus, although self-disqualification and the presumption of honesty may have some bearing on the risk of a biased adjudicator, they should not be heavily relied upon to insure fairness. Note, Due Process and the Combination of Administrative Functions: A Balancing Approach, 63 Iowa L. Rev. 1186, 1204-1205 (1978).

In Iowa, the identified risks of bias by a quasi-judicial body have encompassed or synonymized the appearance of impropriety, as well as impropriety itself:

> Canon 2 of the Code of Judicial Conduct provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." (Emphasis added.) We believe the agency personnel charged with making decisions of great import, as in this case, should be guided by this rationale. Antsey v. Iowa State Commerce Commission, 292 N.W.2d 380, 390 (Iowa 1980).

Indeed, quasi-judicial bodies may be required to adhere to more strict propriety and appearance than that to which judges must adhere:

> Adjudiciation is that agency process resembling the action of a court when it decides a typical case.... In the performance of this adjudicatory function, the parties whose rights are involved are entitled to the same fairness, impartiality and independence of judgment as are expected in a court of law. Cit. Although procedures and rules of evidence are less rigid in quasi-judicial bodies than in courts, there can be no difference under our concept of justice between the two tribunals in respect of these fundamental requirements. Cit.
>
> It has been suggested in a proceeding of this kind, because of its informality and the absence of

> many of the safeguards thrown around court proceedings, the rigid requirement that the trier be impartial and unconcerned in the result should be applied more strictly. Cits....
>
> We determine there are compelling considerations, including the basic considerations of fairness, which demand ex parte communications between members of county boards of adjustment who are exercising their adjudicatory functions and interested parties should not occur. Rodine v. Zoning Board of Adjustment of Polk County, 434 N.W.2d 124, 126-27 (Iowa App. 1988).

As a final prefatory comment, West notes the importance of examining the impartiality of each Board member. The contract of a superintendent may be terminated only "by a majority vote of the membership of the board... " §279.24, Code of Iowa, [emph. supp.] Here, a "majority vote" was 4, there being a Board "membership" of 7. Only 6 members voted for termination. app., p. 61. Accordingly, if 3 of them were not

fair and impartial decisionmakers, the termination should be reversed and the contract reinstated. Matter of Waterloo Community School District, 338 N.W.2d 153, 156 (Iowa 1983). Further, even if only 1 or 2 are disqualified as unfair and partial decisionmakers, then the case still should be remanded for decisionmaking free of their influence, [if not too late to do so]. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583, 592 (D.C. Cir. 1970).

Division III

THE TRIAL COURT ERRED BY FAILING TO ADDRESS AND RESOLVE THE ISSUE OF WHETHER THE TERMINATION VOTES OF TWO BOARD MEMBERS SHOULD HAVE BEEN INVALIDATED BECAUSE OF THE UNACCEPTABLE BIAS RISK OF PERSONAL ASPERSIONS.

As one of the integrated termination charges to be considered, the Board enumerated that:

> Superintendent West has made many derogatory remarks... about individual Board Members. He has stated that Denny Wessels was "too dumb to pour piss out of a shoe" and that he "cheated his way through college." He called Erling Aalgaard "a tight screw". app., p. 51.

Lipps thereafter presented evidence to support those charges. app., pp. 122-123. He also presented evidence that West had called the Board "the worst board he'd ever worked with." app., p. 122. The Board, including members Aalgaard and Wessels, then passed on this evidence, app., pp. 59-61, found as fact that West had made such derogatory remarks, app., pp. 50-51, and concluded inter alia that they formed a reasonable foundation to terminate existed because:

> The record establishes that there has been a breakdown in

> communication between Superintendent West and the School Board, poor communications between Superintendent West and staff members, and that Superintendent West has lost the trust of the majority of the Board of Directors of the Buffalo Center-Rake Community School District. app., p. 54.

The United States Supreme Court has held that the situation "in which the adjudicator has... been the target of personal abuse or criticism from the party before him.... " is one of the "various situations... identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 95 S.Ct. 1456, 1464, 421 U.s. 35, 46-47, 43 L.Ed.2d 712 (1975).

The derogatory remarks which Aalgaard and Wessels openly avowed that West had made about them were "highly personal aspersions" of the kind which

disqualified them from sitting in judgment:

> Many of the words leveled at the judge in the instant case were highly personal aspersions, even "fighting words" - "dirty sonofabitch", "dirty tyrannical old dog," "stumbling dog," and "fool.... " Insults of that kind are apt to strike "at the most vulnerable and human qualities of a judge's temperament." Cit. mayberry v. Pennsylvania, 91 s.Ct. 499, 505, 400 U.s. 455, 465-466 (1971).

Again then, this disqualification was mandated not by a showing of actual bias, but rather upon a showing of an unacceptable risk of bias:

> In making this ultimate judgment the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court [school board] and the interests of the accused." Cit. "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between contending parties,"

> but due process of law requires no less. Taylor v. Hayes, 94 S.Ct. 2697, 2704-2705, 418 U.S. 488, 501, 41 L.Ed. 897 (1974).

This precise position was argued to the trial court. 1/15/91 brief, pp. 194-196, tr. ct. rec. The trial court, however, failed to address or resolve the attendant issue. app., pp. 306-309. This failure was error, as was the error in not determining that as a matter of law, the termination votes of Aalgaard and Wessels were invalid.

Division IV

THE TRIAL COURT ERRED BY FAILING TO ADDRESS AND RESOLVE THE ISSUE OF WHETHER THE TERMINATION VOTES OF TWO BOARD MEMBERS SHOULD HAVE BEEN INVALIDATED BECAUSE OF THE UNACCEPTABLE BIAS RISK OF PRIOR STATEMENTS ON THE MERITS.

During the ALJ hearing, West placed

into evidence corroborated testimony that prior to the 1989 school board election, Wessels assisted Smith in his successful campaign, and Smith campaigned publicly with such remarks as "West is the problem, he's got to go." app., pp. 132-135. This testimony extended to remarks after the campaign. app., p. 134. Both Smith and Wessels testified during this hearing, but neither denied the corroborated testimony placed into evidence by West. app., p. 134.

In Wedergren v. Board of Directors, 307 N.W.2d 12, 17 (Iowa 1981), the Iowa Supreme Court cited with approval Staton v. Mayes, 555 F.2d 908 (10th Cir. 1977). In the cited case, a school board member had remarked in his campaign that 2 other members had said "that no progress could be made until there was a new superintendent... [and] it had become

apparent to him, [the campaigning member], that the trouble lay with the superintendent... " id., at 913. In this opinion, the Circuit Court held that all 3 members were disqualified:

> The first public statements before the hearing by defendant Mayes for the removal of Dr. Staton, and the discussions by defendants Moore and Wade as admitted, reveal a tribunal not meeting the demands of due process for a hearing with fairness and the appearance of fairness. Cits. These were not the mere statements on a policy issue related to the dispute, leaving the decisionmaker capable of judging a particular controversy fairly on the basis of its own circumstances. Cit. Nor was this simply a case of the investigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges. Cits.
>
> Instead this case involves statements on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical. Cit....
>
> We are mindful of the reference in the trial court's opinion to the

> testimony by each defendant that they voted to dismiss plaintiff based on the evidence presented at the hearing, and that plaintiff had failed to establish that he was denied procedural due process. While the defendants testified that they require proof at the hearing and decided on the basis of the proof, the evidence is uncontradicted on the making of several public statements by defendant Mayes for the removal by Moore and Wade as well. We are convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of the circumstances. Cits....
>
> We do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession. Id., at 914-915, [emph. supp.]

Here, Smith and Wessels did not even attempt to disclaim Smith's prior proclamations of predisposition which

were made before the Board's termination consideration. Resultingly, there was even less "room for a determination that there was a decision by a fair tribunal, with the appearance of fairness... " id.

This precise position was argued to the trial court. 1/15/91 Brief, pp. 197-199, tr. ct. rec. The trial court, however, failed to address or resolve the attendant issue. app., pp. 306-309. This failure was error, as was the error in not determining that as a matter of law, the termination votes of Smith and Wessels were invalid.

Division V

THE TRIAL COURT ERRED BY FAILING TO INVALIDATE THE TERMINATION VOTES OF FOUR-FIVE BOARD MEMBERS BECAUSE OF THEIR PROVEN PREJUDGMENT.

In 9/89 or 10/89, Board members Aalgaard and Wessels were busy telephoning the other members to elicit their feelings on what to do about West. app., pp. 146-148. Board member Brass participated in this networking meetings. app., pp. 146-148. Board member Jensvold participated, understood that the members were being polled, and "at some point was made aware that they had the majority of votes." app., pp. 148-149.

On 11/20/89 Board members Aalgaard, Hove, Smith, and Wessels attended a secret meeting to discuss what to do about West. app., pp. 161-171, 211-227. They all made some very definite statements about their dissatisfactions with West and their beliefs and commitments that he had to go. app., pp. 161-171, 211-227.

On 11/28/89, Board members Aalgaard,

Brass, Hove, Smith, and Wessels again attended a secret meeting, this time to inform West directly that a majority of the Board felt "a change needs to occur... and that there is not support from the board to be able to renew your contract for another year." app., pp. 171-178, 227-231.

On 1/3/90, Board members Aalgaard, Brass, Hove, Smith, and Wessels attended a special meeting to which they brought pre-prepared evaluations of West. app., pp. 184-192. The meeting was held on short notice. app., pp. 184-192. It was not the customary time of the year to evaluate West. app., pp. 184-192. It was not proper policy to evaluate West without his consent. app., pp. 184-192. Finally, despite the fact that the composite figures from the individual evaluations did not total an

unsatisfactory result and despite good evaluations just 9 months previous, each of these 5 members voted for a motion "that based on the evaluations of Supt. West conducted on this date... that his performance be deemed unsatisfactory." app., p. 189.

On 1/10/90, the same 5 board members attended another special meeting called on short notice. app., pp. 193-209. Each participated in the orchestrated performance conducted by Aalgaard and Lipps in an effort to discredit West publicly. app., pp. 193-209. Smith participated too in the performance preparation. app., p. 201. Each voted to "reaffirm the unsatisfactory evaluation". app., pp. 206-207. Only Board member Jensvold abstained because "I didn't feel like I had enough information to make a good decision... "

app., p. 207.

During the ALJ hearing, Board member Aalgaard, Brass, Smith, and Wessels testified. app., pp. 38-40. Wessels "summarize[d] the reasons why... [he] think[s] Mr. West's contract should be terminated and why the board viewed his performance unsatisfactory." app., p. 39. Brass and Smith testified that their present opinions were that the 10 termination charges were "valid". app., pp. 39-40. Aalgaard testified that he had reached the "conclusion" that it would be difficult to work with West. app., p. 38.

In the termination proceedings, Lipps had the burden to prove the termination charges. E.g., Board of Education of Fort Madison Community School District v. Youel, 282 N.W.2d 677 (Iowa 1979). However, he was relieved of

this burden by any decisionmaker prejudgment:

> Prejudgment is a preconceived point of view that affects the weight of evidence presented at the hearing....
>
> A trier of fact is charged with resolving adjudicative facts on the basis of a preponderance of the evidence presented. This requirement is premised on the notion that an impartial adversary hearing is the most accurate method of resolving adjudicative facts.... A preconceived view about adjudicative facts creates the danger that the adjudicator will not be persuaded by the weight of the evidence presented at the hearing sufficient to persuade the impartial adjudicator. In other words, it creates the danger that the parties will not have a meaningful opportunity to persuade the adjudicator. Disqualification is therefore required if there exists an unacceptable risk that the preconceived view of adjudicative facts will shift the burden of proof prescribed by law. Note, Due Process of the Combination of Administrative Functions: A Balancing Approach, 63 Iowa L. Rev. 1186, 1193-1195 (1978).

Atypically, the trial court addressed the prejudgment issue. app.,

pp. 306-309. Typically, however, it only brushed the issue's surface. app., pp. 306-309. Moreover, it did not even address the glaring expressions of prejudgment by the 4 members as witnesses. app., pp. 306-309. That is, although generalizing "that the board was fair and impartial", app., p. 309, the trial court did even allude to the fact that the Board majority's testimonial prejudgment, unquestionably prominent on the record, served as the ALJ's following primary evidentiary basis for proposing the termination which this same majority then adopted a month later as decisionmakers:

> There has been a significant breakdown in the communication and trust between Superintendent West and the Buffalo Center-Rake Community School Board. Each School Board member who testified at the hearing attested to such a breakdown or lack of trust between the Board and the Superintendent. app., p.

53; see also, app., p. 52.

Because of the natural consequences of error, see divisions I & II, supra, it is possible to comprehend why the trial court did not grasp the absolute clarity of the 11/28/89 prejudgment. It is even barely possible to comprehend how the trial court could have ignored the significance of the "consensus" and "evaluations" as forms of prejudgment. However, it is completely impossible to comprehend how the trial court could have minimalized a combination of the consensus, so-called "suggestion" to resign, evaluations, and opinion testimony to an innocuous "knowledge of incidents which seriously called into question West's performance as superintendent... " app., p. 309.

It was plain error for the trial court to have so minimialized. Far from

being just "some exposure... to facts in dispute... " the consensus, the 11/28/89 statement, the evaluation, and the opinion testimony, individually or in combination, constituted overwhelming "evidence that a board has prejudged the facts of the case... " app., p. 307, quoting Wedergren v. Board of Directors, 307 N.W.2d 12, 17 (Iowa 1981). It also was plain error for the trial court to have characterized the issue as one of whether the prejudgments "substantially prejudiced West's rights during the termination process... " app., p. 308. The very essence of prejudgment is substantial prejudice. Note, 63 Iowa L. Rev., supra, at 1194-1195.

Division VI

THE TRIAL COURT ERRED BY FAILING TO INVALIDATE THE TERMINATION VOTES OF FOUR-

FIVE BOARD MEMBERS BECAUSE THEY ACTED AS PROSECUTORS, WITNESSES, AND JUDGES.

On 12/18/89, the Board authorized Aalgaard to appoint a committee to work with legal counsel. app., p. 182. Apparently, that committee was appointed because on 1/3/90, on short notice, the Board met with a plan of action in hand. app., pp. 34, 182-183. The plan included retaining Lipps and foisting a prearranged unsatisfactory evaluation on West. app., pp. 34, 182-183. The unsatisfactory evaluation subsequently was bootstrapped into one of the 10 reasons for considering termination. app., pp. 43-55.

On 1/10/90, the Board again met with a prearranged plan of action in hand. app., pp. 192-209. This plan was prepared by Aalgaard, Smith, and Lipps

with input from other board members. app., pp. 200-202. It included a plethora of accusations in the form of 38 questions with subparts. app., pp. 43-55, 192-209. During the ALJ proceedings, these questions were flipflopped into the particulars of the 10 reasons. app., pp. 33-34, 37, 43-55.

The plans of actions for both meetings were transparent attempts by the Board majority to adjudicate a case against West in the court of public opinion, [having already adjudicated the case amongst themselves]. app., pp. 192-209. The truth of such a focus was revealed in the 1/10/91 secret meeting which started with Lipps advising them that the destruction of their working relationship was already a "fact". app., pp. 203-26. Further, it seems equally transparent that the majority's

investigation after 11/28/89 was for the sole purpose of obtaining a conviction, not something less.

After 1/10/90, the Board shifted venue for the court of public opinion to the ALJ's jurisdiction, wherein the ALJ and the public shared adjudicatory functions. In his opening statement, for example, Lipps made it obvious that the ALJ, not the Board, was seen as the arbiter of the Board's pre-existing adjudication: "All they, [the Board], can do is vote to consider termination. And it will be up to this court to determine whether or not to sustain that termination." app., p. 36; see also, app., p. 178. In fact, Lipps was able to "sustain" the prosecution not only by the 4 majority members giving their prejudgment opinions in favor of termination, but also by having them

testify to what they had uncovered during their post-decisional investigation, [much of which was hearsay]. app., pp. 38-40; see also, transc., tr. ct. rec. Of the 706 pages of prosecution testimony, 386 pages were comprised of the majority's testimony. app., p. 35.

In the end, ALJ found only 25% of the charged particulars to be fact and only 10% of the charged reasons to be proven. app., pp. 52-54. However, the ALJ simply had to "sustain" the 10%, [representing the breakdown of the relationship], because the majority made it a fact by testifying that they could not work with West. app., pp. 53-54. Even so, he recognized the majority's role in producing the position it prosecuted: "Unfortunately, the Board's actions on November 20, 1989, started a chain of events which entrenched the

respective parties in an inflexible position... " app., p. 55. [Parenthetically, it cannot be left unobserved that by adopting the ALJ proposed decision, the Board also adopted that and other criticisms of themselves. app., pp. 60-61.]

At the 4/30/90 meeting, without having access to much of the evidence, the Board majority quickly adopted a pre-prepared decision, by its style most probably prepared by Lipps. app., p. 59. They added to the proposed decision. app., p. 60.

Fifty years ago, the Iowa Supreme Court declared that the roles of prosecutor and judges normally are incompatible, thereby calling it "mere mockery" when "[t]he verdict was ready to be rendered before the trial commenced". Sandahl v. City of Des Moines, 227 Iowa

1310, ___, 290 N.w. 697, 698-699 (1940).

Thirty-five years ago, the United States Supreme Court declared that the roles of prosecutor, witness, and judge normally are incompatible, thereby condemning the practice of a judge "weighing" his own evidentiary observations to adjudge contempt charges he himself instigated. In Re Murchison, 75 S.Ct. 623, 625-627, 439 U.S. 133, 137-139 (1955); accord, Tyler v. Swenson, 427 F.2d 412, 415-416 (8th Cir. 1970). Later, it distinguished that the roles of an investigator and a judge are not necessarily incompatible. Withrow v. Larkin, 95 S.Ct. 1456, 1464-1470, 421 U.S. 35, 43 L.Ed.2d 712 (1975). Even then, however, it warned that "[o]f course, we should be alert to the possibilities of bias in the way particular procedures actually work in

practice.... [and that] [c]learly if the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent hearing leading to ultimate decision, a substantial due process question would be raised." id., S.Ct., at 1468, 1470, U.S., at 54, 58, [emph. supp.].

More recently, the Iowa Supreme Court declared that under statutory due process also, the roles of a prosecutor, witness, and judge normally are incompatible. Keith v. Community School District of Wilton, 262 N.W.2d 249, 259-262 (Iowa 1978). Although some of the more distinct defects in this case were the absence of non-board witnesses and of insulated, retained prosecutors, still the more fundamental problem was that in

rendering a decision, the board had to judge itself:

> In the present case it was necessary for the board to call upon their own personal knowledge and impression of what Keith had done or had failed to do because there were no other witnesses. The board had determined here from the very start Keith's performance as a teacher was not up to the highest caliber. It then called upon itself to judge the credibility of its own determination as to Keith's performance. We can not comprehend how a board in this position could do otherwise than find itself to be composed of credible witness. id., at 260.

Here, it seems manifest from the record that "in practice", the Board majority went far beyond a preliminary investigation and a hands-off prosecution. Compare e.g., Board of Directors of Fairfield School District v. Justmann, 476 N.W.2d 335, 339-340 (Iowa 1991). However, even if it were not manifest, the "more fundamental problem" still is. The majority members had to

judge the credibility of 386 pages of their own testimony, so it is impossible to "comprehend how a board [majority] in this position could do otherwise than find itself to be composed of credible witnesses." Keith, supra, at 260.

The trial court did not confront the majority's role as witnesses. app., pp. 306-309. It also did not really confront the majority's active involvement in the prosecution, other than to note the retention of Lipps. app., pp. 306-309. Instead, what it really did do was describe the Board as making inquiries and being exposed to some facts, wholly Divisioninsulated by "the built-in due process safeguard of a hearing before a disinterested administrative law judge." app., pp. 306-309.

The trial court erred by positing such superficiality. Patently, the Board

had to make a decision as to whether or not to adopt the proposed decision, a decision which was predicated in large part on the majority's testimony. §279.24, Code of Iowa. Moreover, instead of just passively adopting the proposed decision, the majority actively participated in de novo review and added findings and conclusions which the ALJ had declined to make. app., pp. 59-60. Both the active and the passive actions were clearly decisionmaking, decisionmaking which under no stretch of the imagination could ever appear to be fair and impartial.

* * * *

Division VIII

THE TRIAL COURT ERRED BY FAILING TO ADDRESS AND RESOLVE THE ISSUES OF WHETHER WEST HAD BEEN DEPRIVED OF HIS

CONSTITUTIONAL RIGHT TO DUE PROCESS.

Notwithstanding the authority to the contrary in the preface, supra, expectancies have been recognized as "an interest which is both ascertainable and worthy of protection." Springer v. Weeks and Leo Company, 429 N.W.2d 588, 561 (Iowa 1988). As such, they comprise property because they connote a "valuable right or interest", one of the "everything(s) of value, tangible or intangible, capable of being the subject of individual right or ownership... " State v. Cowen, 231 Iowa 1117, ___, 3 N.W. 176, 180 (1942).

Here, West's expectancy of continued employment was protected by section 279.24, Code of Iowa, was valuable, and was a right owned and secured to him by both the statute and his contract with

the Board. It was every bit as much property, as real property interests subject to defeasement are. Could it be argued seriously that such property rights could be taken without constitutional due process? Accordingly, this property interest could not be taken in violation of constitutional due process. Cleveland Board of Education v. Loudermill, 105 s.Ct. 1487, 1491, 470 U.S. 532, 538-539, 84 L.Ed.2d 494 (1985).

When section 272A.8, Code of Iowa, and the trial court imposed upon West costs, they did not afford the requisite constitutional due process. Rankin v. Independent School District No. I-3, 876 F.2d 838, 841 (10th Cir. 1989). When section 279.24, Code of Iowa, the Board, and the trial court permitted termination of West's continuing contract without any "standards at all" for doing so, but

rather "upon their own notions of what the law should be... " they did not afford the requisite constitutional due process. Giaccio v. State of Pennsylvania, 86 S.Ct. 518, 521, 383 U.s. 399, 403 (1966). Because they never did, [despite invitation to do so], it is very dubious that either the Board or the trial court ever could articulate the meaning of "reasonable foundation". See, app., p. 312. Therefore, it surely was fundamentally unfair to force West to defend against an unknown.